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5 **IN THE COMPETITION**
6 **APPEAL**
7 **TRIBUNAL**
8

Case No: 1570/5/7/22 (T)

9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 Tuesday 9th May 2023 – Wednesday 10th May 2023

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14 Before:

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16 Justin Turner KC

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18 (Sitting as a Tribunal in England and Wales)
19

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21 **BETWEEN:**
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25 **JJH ENTERPRISES LIMITED (trading as ValueLicensing)**

Claimants

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27 V
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30 **MICROSOFT CORPORATION AND OTHERS**

Defendants

31
32 -and-
33

34 **COMPETITION AND MARKETS AUTHORITY**

Intervenors

35
36
37 **A P P E A R A N C E S**
38

39
40 Max Schafer (Instructed by Charles Fussell & Co LLP) on behalf of Claimant.

41 Robert O'Donoghue KC, Nikolaus Grubeck & Michael Armitage (Instructed by CMS

42
43 Cameron McKenna Nabarro Olswang LLP) on behalf of Defendants
44

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Tuesday, 9 May 2023

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(10.30 am)

THE CHAIRMAN: Just give me a couple of minutes.

I just need to read the warning.

Some of you are joining us live stream on our website. I start, therefore, with the customary recording. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording -- whether audio or visual -- of the proceedings and breach of that provision is punishable as contempt of court.

Mr Schaefer.

MR SCHAEFER: Sir, good morning.

I appear for the claimant, ValueLicensing, and my learned friends Mr O'Donoghue KC, Mr Armitage and Mr Grubeck appear for the defendants, Microsoft.

Can I just check that the Tribunal has received the update to the core bundle, which should have come in on Friday, which should take it up to tab H.

THE CHAIRMAN: I may not have, actually.

I do, yes. Thank you.

MR SCHAEFER: I am grateful. That will include ValueLicensing's updated draft directions order at tab H/2.

THE CHAIRMAN: Yes, okay, I am grateful, thank you.

MR SCHAEFER: Sir, as you will have seen from the skeletons you are really faced with two quite different proposals about how this litigation should proceed.

ValueLicensing is asking the Tribunal to set a timetable to a single trial, starting 18 months from now. That would be, just for the record, three and a half years after issue, and two and a half years after Microsoft's attempt to strike out the claim was dismissed. For that purpose, ValueLicensing is proposing a normal disclosure

1 process based on disclosure reports and EDQs and that in turn referring to a list of
2 issues which we had provided a draft of to Microsoft in advance, Microsoft hasn't
3 engaged with that yet.

4 Microsoft, for its part, is proposing a split trial, under which the first trial would be listed
5 two years from now, so that's four years from issue and three years from the dismissal
6 of its strikeout application. While Microsoft does agree that disclosure reports and
7 EDQs are appropriate in this case, although not by reference to an agreed list of
8 issues, which we suggest will lead to some ships passing in the night, perhaps, it is
9 asking the Tribunal today to order quite extensive early disclosure from
10 ValueLicensing in advance of disclosure reports.

11 As far as the background to this goes, I have set out in sections B and C of my skeleton
12 how we reached here.

13 Paragraph 9 very briefly summarises ValueLicensing's claim.

14 **THE CHAIRMAN:** Yes, I have read this, yes.

15 **MR SCHAEFER:** I am grateful. I don't propose to go back over that orally, but as you
16 will have seen I do try to summarise why it has taken us to two years to reach this first
17 CMC and I do ask the Tribunal to bear that history in mind when considering the issues
18 before it today, because as you will appreciate ValueLicensing is concerned to
19 progress this claim expeditiously and fairly, and based on the history to date doing that
20 may not be possible just by agreement between the parties. It may, in my submission,
21 require active case management by the Tribunal and we are respectfully asking for
22 that today.

23 In terms of the issues before the Tribunal today, there are --

24 **THE CHAIRMAN:** I think Mr O'Donoghue --

25 **MR O'DONOGHUE:** Forgive me for popping up, before the claimant starts. Sir,
26 I obviously have a couple of applications, I am in the tribunal's hands as to where they

1 fit. We have quite a lot to say on directions but to some extent it is contingent on the
2 outcome of certainly one of the applications, the split trial, and I am in your hands, sir,
3 as to in what order you wish to do that.

4 **MR SCHAEFER:** Sir, what I was about to do is to take you through the issues and
5 say we are also in your hands as to the order in which we approach the issues. The
6 issues are in the core bundle at C/2.

7 **(Pause)**

8 **THE CHAIRMAN:** I have difficulty navigating because I can't find the letters. But
9 I have them now, okay. So it wasn't hugely inspiring as a list, but yes I have that, yes.

10 **MR SCHAEFER:** Sir, I am grateful. Just a couple of points on these by way of
11 introduction. Item 4, which is other directions, that will include your consideration of
12 the CMA's, the dates for the CMA's written submissions which are agreed --

13 **THE CHAIRMAN:** Yes.

14 **MR SCHAEFER:** -- as a matter of principle.

15 **THE CHAIRMAN:** Yes.

16 **MR SCHAEFER:** You will see 5 and 6 are in square brackets.

17 **THE CHAIRMAN:** Yes.

18 **MR SCHAEFER:** On confidentiality, item 5, ValueLicensing's position is that the
19 Tribunal doesn't need to address that today and with respect isn't really in the best
20 position to, but I will come to that if and when Microsoft presses it.

21 **THE CHAIRMAN:** Yes.

22 **MR SCHAEFER:** 6 is ValueLicensing's application for further information. Microsoft
23 has agreed to provide that, the parties are agreed, I think, now on the dates for it. So
24 the only point is that given the background, and the fact that ValueLicensing did make
25 this application some time ago it does ask for it to be recorded in the order and I have
26 dealt with that in my skeleton at paragraph 22.

1 As I say, beyond that, the order in which you wish to take these points is up to you and
2 I can see an argument that a split trial is the largest point.

3 **THE CHAIRMAN:** I gather Mr O'Donoghue's is enthusiastic to deal with the split trial
4 first.

5 Is that correct, Mr O'Donoghue?

6 **MR O'DONOGHUE:** Sir, it does seem the logical place to start.

7 **THE CHAIRMAN:** Just in terms of timetable, matters have narrowed. Is this likely to
8 go over a day? I don't see why it should?

9 **MR O'DONOGHUE:** Sir, I really hope not.

10 **THE CHAIRMAN:** Okay.

11 **MR O'DONOGHUE:** We will see how we go.

12 **THE CHAIRMAN:** Very good.

13

14 **Application by MR O'DONOGHUE**

15 **MR O'DONOGHUE:** If I deal with the split trial on the RFI there is a small but
16 unfortunate dispute on the date, which is tedious, but there we are, I will come back to
17 that.

18 **MR SCHAEFER:** I thought we had agreed 14 days.

19 **MR O'DONOGHUE:** Sorry, that has been agreed.

20 **THE CHAIRMAN:** Splendid, we will be over by lunchtime then.

21 **MR O'DONOGHUE:** We are bound to finish today on that basis, with a fair wind.

22 The split trial has been covered at some length in writing, so I don't want to labour the
23 point. In terms of basic context I don't need to remind you, sir, with a far more diverse
24 practice than mine that split trials are relatively common in commercial litigation in
25 general. They are often ordered.

26 In the competition space, we haven't done a statistical regression model, but it does

1 seem at least anecdotally that the use of split trials is if anything more prevalent in
2 competition law cases. We would respectfully submit that the use of split trials in
3 competition law cases reflects the often, indeed notoriously burdensome nature of
4 these allegations and in particular the disclosure and expert evidence issues that they
5 can give rise to. The practical consequence is that competition litigation is among the
6 most expensive and onerous type of all commercial litigation and we say at base the
7 use of a split trial procedure is a pragmatic response to that reality, in fact.

8 Now, as we teed up in our skeleton, within the competition law space the use of split
9 trials in particular has been prevalent in abuse of dominance cases. We have given,
10 I think, a number of examples in our skeleton argument, including two recent ongoing
11 cases, one of which is a collective proceedings order case in which the trials are being
12 actively considered.

13 I certainly do not suggest for a moment, nor in fact do I need to, that the use of split
14 trials in abuse of dominance cases is some unerring or extremely commonplace
15 feature, but what can certainly be said with fairness is that it is a very common type of
16 procedural device, or saving, used in these types of cases in particular.

17 I will come back, of course, to the reasons in this case but as a starting point this is
18 a very well-trodden path which has proved effective in practice and we say has borne
19 considerable fruit in terms of savings in costs and court-user time.

20 Of course in any split trial consideration one of the most difficult questions is it would
21 be very difficult sometimes to predict ex-ante or at the time of the application whether
22 the split trial saving in the short term turns out to be a false economy in the longer
23 term, because there needs to be a second trial or even a third trial in any event. That
24 is obviously a difficult assessment, because it involves a degree of prognostication.

25 What can certainly be said based on the statistical sample such as it is in an abuse of
26 dominance cases is that in none of those cases in which a split was ordered on

1 an assumption of dominance has a separate trial on market definition/dominance in
2 fact taken place. We say that is quite a striking fact, which is testament to the efficacy
3 of this particular procedural device in the context of abuse of dominance cases in
4 particular.

5 In some of those cases, of course, that's because the claimant has not succeeded on
6 liability or causation, and in that case of course there is nothing left to try. But
7 a number of the cases which we mention in our skeleton did give rise to findings of
8 liability, and even in those cases there has never, to our knowledge, been a second
9 trial on market definition and dominance. We say as a starting point the track record
10 of the kind of split that we propose in terms of achieving its case management
11 objectives is clear and strong.

12 So that's the starting point.

13 **THE CHAIRMAN:** Just stopping here, I know you are not overplaying your hand on
14 this, but there are, presumably, cases where there aren't split trials and cases where
15 there are split trials.

16 **MR O'DONOGHUE:** Yes, I entirely accept that.

17 **THE CHAIRMAN:** Are you going to show the cases where split trials have been
18 ordered? You refer to them in your skeleton.

19 **MR O'DONOGHUE:** Sir, we will come to a number of them.

20 **THE CHAIRMAN:** In due course, yes, fine.

21 **MR O'DONOGHUE:** I entirely accept, and I said this is not some unerring --

22 **THE CHAIRMAN:** No, no, no.

23 **MR O'DONOGHUE:** -- practice, but it is at least common, I think is maybe the fairest
24 way of putting it.

25 **THE CHAIRMAN:** Yes.

26 **MR O'DONOGHUE:** That is not a pudding I want to over egg, that's entirely fair.

1 **THE CHAIRMAN:** No.

2 **MR O'DONOGHUE:** Turning to the present case, and I will come to the cases shortly,
3 we say as a starting point it is manifest that market definition of dominance in this case
4 would be a very substantial exercise indeed. If we can, sir, quickly turn, this is
5 unpacked at some length in our skeleton argument, which I think is at H, at the back
6 end of the core bundle.

7 Sir, it starts on page 549, paragraph 16.

8 **THE CHAIRMAN:** Yes, I have it loose, yes. Paragraph 16 of your skeleton.

9 **MR O'DONOGHUE:** Yes.

10 **THE CHAIRMAN:** You set out --

11 **MR O'DONOGHUE:** What we have done there is by reference to VL's pleading we
12 have unpacked the nuts and bolts of market definition and dominance. Just to pick up
13 on a handful of points, it continues over a couple of pages --

14 **THE CHAIRMAN:** Yes.

15 **MR O'DONOGHUE:** -- I am not going to go line by line.

16 **THE CHAIRMAN:** Yes.

17 **MR O'DONOGHUE:** But there are two dominant relevant markets pleaded.

18 **THE CHAIRMAN:** Yes.

19 **MR O'DONOGHUE:** So it is potentially double the work.

20 Then B, a striking number of territories, up to 31 jurisdictions, EEA, plus UK.

21 Now, what I will come to in the split trials which have been ordered in abuse of
22 dominance cases, I think without exception the focal market has been a UK-only
23 market. This by contrast is EEA wide plus UK. So in terms of geographic scope, this
24 is a significant upgrade, or expansion, on at least the cases that we are aware of today.

25 Sir, over the page --

26 **THE CHAIRMAN:** I have seen your -- you put in the skeleton that that makes it more

1 complicated. Why does the fact it is a wider geographical area per se make it more
2 complicated?

3 **MR O'DONOGHUE:** Sir, the geographic market assessment, there will need to be
4 an assessment of whether the conditions of competition between these different
5 jurisdictions are sufficiently homogeneous in nature for that territory or territories to be
6 regarded as a single market, or if there is a degree of heterogeneity there may need
7 to be geographic markets on a national or more localised basis.

8 **THE CHAIRMAN:** Is that going to be part of your positive case?

9 **MR O'DONOGHUE:** Yes, it will.

10 **THE CHAIRMAN:** That there are distinct markets within the EEA?

11 **MR O'DONOGHUE:** In any event, based on the pleaded case, there will by necessity
12 have to be an examination of whether the conditions of competition in these 30
13 jurisdictions are sufficiently similar for them to be a contiguous markets. That is
14 unavoidable.

15 There may be another layer to the onion. If we positively contend for different sub
16 markets or segments, that may be a further complication. But as a starting point, given
17 the pleaded geographic scope of EEA plus UK, there will need to be an examination
18 of the conditions of competition in those territories.

19 **THE CHAIRMAN:** Right.

20 **MR O'DONOGHUE:** That's the pleaded case.

21 **THE CHAIRMAN:** Yes, but it is a single market. It is obviously not a -- I am just trying
22 to understand what the scope of the dispute is. Is it any different if you are looking at
23 the UK whether there is a different market in Somerset and Yorkshire? Is it materially
24 different when you start looking at different countries within the EU?

25 **MR O'DONOGHUE:** Sir, it really is a question of scale and scope. In my submission,
26 by definition, once one expands beyond the UK to include 30 other countries, EU 27

1 plus EEA three, that is, by its very nature in terms of scale and scope, a very different
2 and substantially more onerous exercise than looking at Cornwall versus Essex, for
3 example.

4 **THE CHAIRMAN:** I can see it may be. I am just trying to understand whether it is
5 likely to be.

6 **MR O'DONOGHUE:** Yes.

7 **THE CHAIRMAN:** You are not able to assist me further on that at this stage?

8 **MR O'DONOGHUE:** Well, the EEA is the pleaded territory.

9 **THE CHAIRMAN:** Yes.

10 **MR O'DONOGHUE:** We will need to examine for the totality of that territory how
11 conditions of competition compare and contrast.

12 **THE CHAIRMAN:** Yes.

13 **MR O'DONOGHUE:** Whether indeed they are sufficiently homogeneous between
14 these 30-odd jurisdictions to be a single market, or whether there is heterogeneity and
15 therefore there are potentially 30-odd separate markets. That is an exercise which,
16 even on the pleaded case, is unavoidable.

17 Of course the customers in each of these territories may not be identical. We are
18 talking about enterprise and business customers. They may be different shapes and
19 sizes in different territories, some of them may have buyer power, which would be
20 a counterweight to dominance and so on. So there will be issues that are either
21 inherently national or local, or at least potentially different, that will very likely require
22 a comprehensive geographic assessment.

23 Sir, if we go back to our skeleton, so what we have done over the page, page 7,
24 internal page 550, under D.

25 **THE CHAIRMAN:** Mm-hm.

26 **MR O'DONOGHUE:** Again by reference to VL's pleading in the little roman numerals

1 we have unpacked the various elements of their case on market definition and
2 dominance just to show the Tribunal the sheer range of issues that will need to be
3 assessed.

4 One of those of course, which Mr Schaefer focuses on is (i), market shares. But even
5 on his own pleaded case there are half a dozen other substantial factors that are
6 distinct which will require a separate assessment. As you see, network effects, buyer
7 power, brand loyalty, barriers to entry, revenue per user over time, leveraging and
8 bundling and so on. Sir, it is simply not the case that we will be looking at some magic
9 market share numbers and this is done on some truncated basis. On his own pleaded
10 case this is a multifactorial, multi-layered, and in my submission evidently complex
11 series of factors that need to be considered.

12 Indeed, **as Mr Schaefer's own pleading at paragraph 39 says, this will require**
13 **expert economic evidence on the questions of market definition and dominance**
14 **specifically. That is something which is distinct from quantum expert evidence,**
15 **and indeed from the evidence on the effect on the market.**

16 Sir, it is obviously a very rough estimate, we have given an indication that the total
17 costs for all parties saved by hiving off market definition and dominance would be in
18 the range of £2 to £4 million and the saving of court time could be up to two weeks.
19 As far as I am aware that has not been controverted in any way, shape or form.

20 **THE CHAIRMAN:** The bit I am struggling with at the moment -- I am sure it is my
21 fault -- is that I can see how potentially these arguments can be enormously
22 complicated, clearly. But in this case a relevant question is are they going to be hotly
23 contested and all of these various factors and on what basis.

24 **MR O'DONOGHUE:** Yes.

25 **THE CHAIRMAN:** Just as a sort of bird's eye view can you just explain to me what
26 Microsoft's position is going to be? You obviously have a presence in the general

1 area, which I appreciate is not in any way determinative, but of the market that has
2 been identified, what proportion do you say that Microsoft has of that market? I think
3 there are figures of 75 per cent put in the pleading. Are you going to be disputing that?

4 **MR O'DONOGHUE:** Sir, it really begs the question, of course, the market shares are
5 the market shares in the appropriately defined relevant market.

6 **THE CHAIRMAN:** Of course.

7 **MR O'DONOGHUE:** We do not accept that the markets put forward are the
8 appropriately defined relevant markets.

9 **THE CHAIRMAN:** Right.

10 **MR O'DONOGHUE:** Sir, two things if I may.

11 First of all, we are perfectly entitled and we do in our pleading, based on the factors
12 put forward by the claimant, say well, we deny dominance in the relevant market
13 definition and we put you to proof on each and every one of these factors. So at
14 a minimum there will be vigorous debate at trial about each and every one of these
15 factors and on the face of it each one of them would certainly require expert evidence
16 and may well require significant factual evidence.

17 **THE CHAIRMAN:** What are you contending the relevant market is?

18 **MR O'DONOGHUE:** Sir, there are a range of points we would make.

19 First of all the relevant markets as put forward are said to be separate markets for
20 operating systems and Office productivity suites. We do not accept that.

21 There will be a question as to whether, within Office productivity bundles there are
22 separate markets or a bundle market.

23 There is a fundamental issue which this case straddles, which is, as you have picked
24 up from the pleading, sir, there has been a gradual and significant migration over time
25 away from a perpetual licensing model to cloud-based subscription models of software
26 and the boundaries between all things cloud on the one hand and the on-premises or

1 on--site physical market that will be a fundamental issue as well, which is complex.
2 Of course one of the other factors is a temporal one. These alleged restrictions are
3 said to go back, I think, starting in 2016. And the position in 2016 may not be, or will
4 not be, almost certainly, the same as the position in 2020 or 2021 when it comes to
5 cloud.

6 **THE CHAIRMAN:** Sure.

7 **MR O'DONOGHUE:** So this is changing over time, and of course a fundamental issue
8 which the claimant's pleading essentially fudges is whether there is a combined or
9 separate market for new and second-hand licences. What is remarkably unclear from
10 this pleading, sir, they plead these operating system markets and Office productivity
11 suites, but where they are incredibly coy is where does the second-hand licensing
12 component fit within those markets? This of course is important, because my client is
13 not active itself selling second-hand software licences of the kind at issue here. At
14 least to that extent it does not compete with VL.

15 As I understand the pleading, there is said to be an indirect relationship between the
16 second-hand segment of the market in and the new or primary market licence
17 segment. There will be very complex questions as to how these new and second-hand
18 markets inter relate, or whether in fact we are talking about distinct markets. So there
19 is a lot of detail and fabric to these points, and again all of this will need to be explored,
20 certainly with expert evidence, and we apprehend factual evidence.

21 Sir, projecting ahead in terms of scenarios, you have my point that based on the
22 sample to date, where a split of the kind I propose was ordered, the first trial has in
23 one way or another in practice resolved the case.

24 One possibility, of course, is that the claimant fails to establish an infringement of
25 competition law at all. For example, if the Tribunal accepts Microsoft's case that there
26 is no appreciable affect on competition.

1 Another possibility where a second trial would be obviated is where the claimant does
2 establish the infringement but has not established that it caused any loss.

3 So there are two scenarios in which a second trial would not take place.

4 The only scenario in which the second trial becomes a possibility is if the claimant
5 succeeds both on liability and quantum, including causation. But even then the split
6 we propose would mean that in a first trial all issues other than market definition and
7 dominance would be decided. This would mean that if infringement, causation and
8 damage are shown by the claimant there would at least be a figure for damage that
9 could provide a pretty strong focal point for settlement. That is why we say at this
10 stage there is certainly a realistic, and we would suggest a strong possibility that the
11 split we propose would in practice lead to the resolution of the case. It does of course
12 bear emphasis that these are claims for historic alleged violations only. No injunctive
13 or behavioural relief is sought going forward. It is a money claim for which they will
14 get interest to the extent there is any delay in that money being paid.

15 On the face of it we are not entirely clear why the claimant opposes the split trial we
16 propose.

17 Sir, as you will no doubt be aware, often in split trial cases there will be a debate as to
18 whether one can actually make a clean split between trial 1 and trial 2. But it is notable,
19 if you can turn this up, it is G/64, the correspondence at 461.

20 **THE CHAIRMAN:** Yes, I have that in mind. Yes, okay.

21 **(Pause)**

22 **MR O'DONOGHUE:** Sir, it is under 8(c).

23 **THE CHAIRMAN:** 8(c)?

24 **MR O'DONOGHUE:** Yes, page 461.

25 **THE CHAIRMAN:** Yes.

26 **MR O'DONOGHUE:** A letter from the claimant. You see under (c):

1 "We accept the dominance is in principle capable of being hived off."
2 Then they go off to make the points which I will come to about the relevant market. So
3 at least in terms of the dominance split, they accept that is a clean split that can --
4 **THE CHAIRMAN:** Well, that's one -- yes, I gather from Mr Schaefer's skeleton that
5 he was backing away from that a little bit.
6 **MR O'DONOGHUE:** Yes, he has a point on market definition argument which I am
7 coming to now.
8 **THE CHAIRMAN:** Okay, right.
9 **MR O'DONOGHUE:** It is, to be fair to the court, the concession set out here.
10 **THE CHAIRMAN:** But I mean if Mr Schaefer has rethought this as the arguments
11 have developed, you are not suggesting he is bound by that statement?
12 **MR O'DONOGHUE:** I don't think he has withdrawn this particular concession, I think
13 he is sticking to his guns on market definition. But I will deal with his point, I'm not
14 ducking it.
15 In terms of the reasons the claimant puts forward, they really give two reasons.
16 The first is that because the defendant hasn't pleaded in detail to its case on market
17 definition and dominance, it is unclear whether the savings from not dealing with
18 market definition and dominance in trial 1 would be material.
19 **THE CHAIRMAN:** Yes.
20 **MR O'DONOGHUE:** That is his skeleton at 47.1.
21 **THE CHAIRMAN:** Yes.
22 **MR O'DONOGHUE:** We do find this contention rather surprising. The whole
23 point of splits based on assumptions of market definition and dominance is that
24 the savings from not doing market definition and dominance would likely be
25 very substantial indeed.
26 Just to give the Tribunal one recent authority which makes this point, it is the Boyle

1 case, which is in tab 11 of the authorities bundle. This is a ruling of the President.

2 **THE CHAIRMAN:** Yes, I confess I couldn't find it. I have not looked at this over the
3 weekend.

4 **MR O'DONOGHUE:** Yes. Sir, it is the Boyle case.

5 **THE CHAIRMAN:** Yes, I have it, yes.

6 **MR O'DONOGHUE:** This is obviously a CPO in an abuse of dominance case.

7 **THE CHAIRMAN:** Yes.

8 **MR O'DONOGHUE:** The bit I am interested in is in paragraph 21. The President,
9 second line:

10 "The savings are that the economic evidence, and there would be economic evidence
11 needed to understand the question of dominance, would not be incurred until the
12 answer or outcome to stage 1 had been determined. We accept that the cost of
13 economic evidence is high both in terms of time and ... money."

14 In that case we would suggest the economic evidence on dominance was much less
15 far-reaching than the present case, because of course the subject matter of the case
16 in terms of defendants was a monopoly franchise network. It certainly isn't obvious to
17 me on what basis a franchise monopolist would be denying its dominant position.
18 Even in that case the President considered the savings from avoiding economic
19 evidence in trial 1 on market definition and dominance to be substantial, that was it
20 seemed common ground, or at least something not pushed back on by either party.

21 Sir, just to give you one example, I am sure it is very irritating for judges, I don't know
22 was it is Oscar Wilde or John Fortescue who said that comparisons are odious, but
23 I am going to give you one in any event.

24 If I can hand this up to the Tribunal. Sir, what we have done -- this is the most recent
25 CMA decision in a major abuse of dominance case, a case called Hydrocortisone,
26 which was before the Tribunal at the end of last year and early this year.

1 **THE CHAIRMAN:** Thank you.

2 **MR O'DONOGHUE:** Sir, you will be relieved to hear I am not inviting you to read it
3 paragraph by paragraph. What we have done is we have extracted the market
4 definition and dominance section from the decision, and it is about 100 pages long,
5 and is pretty dense, as you can see.

6 That was a case where for most of the period the defendant was in fact a monopolist
7 in the market, and where for some of the period concerned there was limited entry in
8 the market. On the face of it would you think this is a relatively easy case. But even
9 in a case like that, the analysis is extremely detailed, multifaceted and multifactorial.
10 What you don't see is what VL seem to be hinting at, well, you simply get a magic
11 market share number and that's the end of the debate. You will see, sir, there is a very,
12 very detailed analysis of price, non-price factors, barriers to entry, buyer power and so
13 on.

14 **THE CHAIRMAN:** Are you trying to scare me off?

15 **MR O'DONOGHUE:** No, sir, I am trying to inject a degree of realism as to the scale
16 of these tasks.

17 **THE CHAIRMAN:** Yes.

18 **MR O'DONOGHUE:** These are very substantial exercises in virtually all cases. I am
19 not trying to scare you off.

20 I would concede it may well be a life-shortening experience, but it is not forbidding
21 beyond that.

22 So that's the first reason. They say well, it wouldn't actually save very much. In my
23 submission that is a very, very surprising submission, based on what we see
24 happening in these cases. One is bound to ask rhetorically, well, if that is the case
25 why have so many of these cases been split along the lines that we propose? That
26 can only be because the savings are substantial.

1 One can sort of disagree in terms of the precise estimate, but in my submission one
2 is at the very least talking about a substantial seven-figure sum. These economists in
3 my submission are not cheap. And it will occupy a lot of time in terms of
4 cross-examination at trial of experts and factual witnesses.

5 Now, whether that's a savings of five, six, seven or eight days, again one can debate.
6 But in terms of scale, in my submission, one is looking at substantial monetary savings
7 and substantial savings of court-user time. That, in my submission, ought to be
8 undeniable, frankly.

9 That's the first reason.

10 The second reason, it is paragraph 48 of my friend's skeleton, we can turn that up. It
11 is again at the back of the core bundle. Sir, it is paragraph 48.

12 **THE CHAIRMAN:** Mm-hm. Paragraph 48 of your skeleton?

13 **MR O'DONOGHUE:** Of VL's skeleton.

14 **THE CHAIRMAN:** VL's skeleton argument, I beg your pardon.

15 **MR O'DONOGHUE:** It is tab H1, sir.

16 **THE CHAIRMAN:** Oh, sorry, I have it loose.

17 **MR O'DONOGHUE:** The page number is 536.

18 **THE CHAIRMAN:** Yes, okay, I have it.

19 **MR O'DONOGHUE:** Sir, it starts in (i). They say:

20 "Unlike dominance ..."

21 That is why we say on dominance there has effectively been a concession, what VL
22 is doing here is they are drawing a distinction between dominance on the one hand
23 and market definition on the other. They say:

24 "Unlike dominance, market definition is not an element of liability to be made out or
25 not ..."

26 Then they give a reference to the Compare the Market case. If you can read that.

1 I will come back to that. I don't accept that that is correct in the present case. I will
2 come back to that.

3 Then further down, under (ii):

4 "... any findings of liability in the first trial would be contingent on the assumptions
5 made as to the relevant market. If MS successfully challenged those assumptions in
6 a second trial, the findings in the first trial could be undermined."

7 So that's his real point. He says that in terms of market definition the contours of that
8 could make a potentially significant difference in terms of the conduct and outcome of
9 the first trial.

10 In response to that, sir, we make a handful of points.

11 First, the logic of the point is, with respect, difficult to follow. The split we propose
12 assumes that the claimant is right both in terms of its pleaded relevant markets and in
13 terms of dominance. It is, after all, dominance in the relevant market as pleaded.

14 **THE CHAIRMAN:** Mm-hm.

15 **MR O'DONOGHUE:** The claimant is right that there is a possibility that a second trial
16 would decide that its case on dominance and market definition is wrong. But that is
17 really no different to all of the other cases in which a split trial was assumed on the
18 same basis. Since dominance has to be in a properly defined relevant market, and
19 that is a prerequisite before the question of abuse arises, that possibility always exists.
20 So the fact that he might lose in a second trial and that the pleaded relevant markets
21 and dominance is found to be incorrect is not in itself a point in his favour.

22 **THE CHAIRMAN:** The difference is if you are -- I understand your position is that it is
23 tough if he gets his relevant market wrong.

24 **MR O'DONOGHUE:** Yes.

25 **THE CHAIRMAN:** That's it, game over.

26 **MR O'DONOGHUE:** Yes.

1 **THE CHAIRMAN:** But if this is all happening at trial and the evidence falls in a certain
2 way he may, I am not saying he would be entitled to, but he may be able to say, "Well
3 look, I now have an alternative case and if I am wrong about the first relevant market
4 Mr O'Donoghue is urging upon you today that the relevant market is Y not X. If he is
5 right about Y, then I would nuance my arguments the following way and you have all
6 of the evidence and so I would invite you to reach the same conclusion on two
7 alternative cases".

8 **MR O'DONOGHUE:** Yes.

9 **THE CHAIRMAN:** Do you have any, given the trouble if it is done separately it is
10 tough, it is game over.

11 **MR O'DONOGHUE:** That's my next point. Before I come to that there was one -- you
12 saw the reference to Compare the Market in 48(i).

13 **THE CHAIRMAN:** Yes.

14 **MR O'DONOGHUE:** He says:

15 "Market definition is simply a tool of the analytical process ..."

16 Do you see the quotation, sir?

17 **THE CHAIRMAN:** Yes.

18 **MR O'DONOGHUE:** "... towards determining whether a particular agreement,
19 provision in an agreement ...does or does not amount to a restriction on competition."

20 Compare the Market, of course, was a case which only concerned agreements and
21 not abuse of dominance. In an abuse of dominance case the existence of dominance
22 in a properly defined relevant market is a pre-condition.

23 **THE CHAIRMAN:** It is a condition precedent.

24 **MR O'DONOGHUE:** Yes.

25 **THE CHAIRMAN:** I understand, yes.

26 **MR O'DONOGHUE:** So that's the answer to that. Merely being dominant is not itself

1 a recrimination.

2 Sir, we do reiterate the point there have been a whole bunch of these split trials on the
3 basis I have proposed and the claimants cannot point to a single example where in
4 practice the hypothetical concern they now fasten upon has proved to be a material
5 factor at all.

6 **THE CHAIRMAN:** But you said they have all settled, so it has been a factor neither
7 one way nor the other.

8 **MR O'DONOGHUE:** Sir, it has come up obliquely, I will show you a reference to the
9 cases.

10 **THE CHAIRMAN:** Right.

11 **MR O'DONOGHUE:** But it has not proved to be a problem in any material sense. We
12 say that is a rather eloquent silence.

13 Sir, I said I would show you the cases --

14 **THE CHAIRMAN:** Yes.

15 **MR O'DONOGHUE:** -- and forgive me for taking so long to wind up.

16 **THE CHAIRMAN:** That's fine.

17 **MR O'DONOGHUE:** If we can start, sir, with Arriva. This was a trial conducted by
18 now Lady Justice Rose.

19 **THE CHAIRMAN:** Mm-hm.

20 **MR O'DONOGHUE:** A rather good pedigree, if I may say so.

21 **THE CHAIRMAN:** Mm-hm.

22 **MR O'DONOGHUE:** Sir, this is in the third authorities bundle. I want to go to
23 paragraphs 108 and 109, which are on page 115.

24 **THE CHAIRMAN:** Yes, just give me the context.

25 **MR O'DONOGHUE:** Sir, this was a case involving a concession for a bus contract in
26 an airport --

1 **THE CHAIRMAN:** Yes, yes, I remember, yes.

2 **MR O'DONOGHUE:** -- and the exclusivity clause in the tender contract was found to
3 be restrictive of competition.

4 Sir, if we then go to 115.

5 **THE CHAIRMAN:** Yes.

6 **MR O'DONOGHUE:** There was an argument from the defendants well, okay, we have
7 this bus concession contract, but of course buses compete with rail services in Luton,
8 and therefore you must consider the relevant market as being potentially broader and
9 consider the question of effects on that basis.

10 Sir, if I could ask you to read 108 and 109, and then I can ...

11 **(Pause)**

12 **THE CHAIRMAN:** So, yes, we are dealing with the question of abuse rather than
13 dominance here, is that right?

14 **MR O'DONOGHUE:** Yes, sir, it is the effect on the market, is the point. Sir, the
15 answer, one answer to VL's concerns is if there are other permutations which they
16 wish to put forward which they have not to date, then it is perfectly open to the Tribunal
17 in trial 1 to say, "Well, let's consider your alternative at this stage, and see whether it
18 makes any difference". So that can be baked into trial 1.

19 **THE CHAIRMAN:** Yes, there is no reason in the first trial to have it, have just one
20 version of relevant market --

21 **MR O'DONOGHUE:** Yes.

22 **THE CHAIRMAN:** -- you could have two.

23 **MR O'DONOGHUE:** If they have an alternative, the Tribunal will be perfectly able in
24 the first trial to say well, on that hypothesis it does or does not make a difference.

25 **THE CHAIRMAN:** But at the moment, as of today, we don't know what your alternative
26 market is. So Mr Schaefer says, "Well, I can advance two possibilities" .

1 **MR O'DONOGHUE:** Yes.

2 **THE CHAIRMAN:** "... Mr O'Donoghue is going to suddenly break cover and say ah
3 ha, there is a third", and obviously Microsoft have access to a great deal of information
4 and you may be able to make that hang together as the relevant market. He has still,
5 even though he has put forward two possibilities, he is still exposed with the third
6 because you have not had to put your cards on the table until after the first trial on
7 abuse.

8 **MR O'DONOGHUE:** Yes.

9 Sir, the short answer is twofold.

10 The first is the burden on is Mr Schaefer to prove dominance in the relevant market.
11 I am perfectly entitled to say well, your case isn't made out for the following 57 reasons
12 ... I don't have to put forward a positive case on my side, I am perfectly entitled to
13 attack the case put forward.

14 The other point is, and maybe the real answer --

15 **THE CHAIRMAN:** But if that's your position, if you are saying to the Tribunal you are
16 not going to be putting forward an alternative case, then we can progress on that basis.
17 But you haven't said that so far.

18 **MR O'DONOGHUE:** Sir, it is early days. We will have to speak to our experts, look
19 at the expert evidence, consider the disclosure, and this may go on ...

20 **THE CHAIRMAN:** Yes.

21 **MR O'DONOGHUE:** The answer, sir, is if I turned up at trial and said at the 11th hour,
22 "Well, it turns out after all I have this alternative market definition and dominance point
23 up my sleeve, and it has never previously surfaced", I suspect, sir, that would not be
24 well received at all. At that stage, in my submission, it would almost certainly be my
25 tough luck, it would be too late, it would be considered, quite properly, a form of
26 ambush. So I would have to make my election at an early stage as to what cards I put

1 on the table. If, for whatever reason, my client chooses not to put forward a positive
2 alternative market definition case, well, on their head be it.

3 The practical point, sir, is in any event the Tribunal can and in my submission does, to
4 the extent necessary, conduct the first trial on the basis of certain contingencies, or
5 assumptions, or alternative possibilities. That is something which can be easily baked
6 into the process.

7 We see something similar in Streetmap, which is the next tab. This is the case --

8 **THE CHAIRMAN:** Just show me in this where it was ordered that dominance be dealt
9 with separately and the reasons for that. It is not in this particular judgment --

10 **MR O'DONOGHUE:** I think there is a passing reference at the start. Paragraph 6, sir.

11 **THE CHAIRMAN:** Yes.

12 **(Pause).**

13 **MR O'DONOGHUE:** (i).

14 **THE CHAIRMAN:** Right. So it is not this judgment, that's an earlier judgment --

15 **MR O'DONOGHUE:** Yes, there was an interlocutory order.

16 **THE CHAIRMAN:** -- of Mr Justice Roth. We don't have that. This is one of the ones
17 where it settled?

18 **MR O'DONOGHUE:** Yes, yes.

19 **THE CHAIRMAN:** After trial.

20 **MR O'DONOGHUE:** Yes.

21 **THE CHAIRMAN:** I mean one of the reasons why these, and I don't know, it may be,
22 but if dominance is so important and so complex I don't understand why the cases
23 settle unless it is thought that actually it wasn't a very good argument to start off with
24 and it is not worth going through all of that complexity now having lost on the
25 substantive issue. I mean that's one possible interpretation at least, and if you choose
26 to run a full-throated argument against dominance.

1 **MR O'DONOGHUE:** Yes.

2 **THE CHAIRMAN:** I mean, you know, it is going to be expensive and time
3 consuming --

4 **MR O'DONOGHUE:** Yes.

5 **THE CHAIRMAN:** -- but it is your choice.

6 **MR O'DONOGHUE:** Yes. It is an expensive one for both parties.
7 But, sir, as you will know from practice, of course, if one comes out of the wrong end
8 of a trial the corporate attitude to the litigation --

9 **THE CHAIRMAN:** Complex boardroom psychology, yes.

10 **MR O'DONOGHUE:** -- may well change for a whole series of reasons, particularly in
11 a case like this where if liability and causation are established and there is a quantum
12 number in the first trial, then it is clear where the focus needs to be.

13 **THE CHAIRMAN:** Yes.

14 **MR O'DONOGHUE:** So there may be a need for some pragmatism at that stage as
15 opposed to rigid adherence to principle.

16 **THE CHAIRMAN:** One would hope there would be pragmatism at all stages of the
17 litigation.

18 **MR O'DONOGHUE:** Indeed, **sir, we are pragmatic in proposing a saving of many**
19 **millions of pounds and up to two weeks --**

20 **THE CHAIRMAN:** Okay.

21 **MR O'DONOGHUE:** -- and that is absolutely put forward in complete good faith in
22 terms of both parties and court-user time.

23 Sir, then we have Streetmap, and I am almost done, which is the next tab.

24 **THE CHAIRMAN:** Yes.

25 **MR O'DONOGHUE:** Again, Mr Justice Roth, former President of this Tribunal, so
26 excellent pedigree. Sir, we can see at paragraphs 41 to 43 there you have the

1 assumption of dominance.

2 Then, sir, the final sentence of 43 is important.

3 **THE CHAIRMAN:** Sorry, give me a second, sorry, I am just reading.

4 **MR O'DONOGHUE:** Yes, sir, if I can ask you to read 41 and 42.

5 **(Pause)**

6 At 42 I note the reference to extensive disclosure.

7 **THE CHAIRMAN:** Right.

8 **MR O'DONOGHUE:** Then, sir, 43 is important. As you see in 41 the dominant market

9 was online search.

10 **THE CHAIRMAN:** Yes.

11 **MR O'DONOGHUE:** But there was a second downstream market, which was online

12 maps. And it is not suggested that Google Maps was dominant in that separate

13 market, however defined, for online maps. There you have a case where there was

14 a split trial and where in the first trial the court did not even feel it needed to have any

15 specificity at all as to the precise contours of the downstream market. It was perfectly

16 able to conduct its analysis on the effects of competition without at that stage reaching

17 a firm and settled position.

18 **THE CHAIRMAN:** There was no abuse in this case, was there, is that right?

19 **MR O'DONOGHUE:** Yes, sir, I will show you that, it is 139, but while we are en route

20 if we can quickly go to 106.

21 **THE CHAIRMAN:** Yes.

22 **MR O'DONOGHUE:** There Mr Justice Roth says:

23 "Although not necessary for my findings point ..."

24 **THE CHAIRMAN:** Give me a second, sorry.

25 **MR O'DONOGHUE:** Forgive me, sir.

26 **THE CHAIRMAN:** Sorry, what are you going to next, 106?

1 **MR O'DONOGHUE:** 106.
2 The judge says:
3 "It was not necessary for my findings point. I should add that it is appropriate also to
4 have regard to the extent of Google's assumed dominance."
5 He goes on to make the point, well, they are not just dominant, they are really
6 dominant. That is another example of what we see in Arriva, which is in the first trial
7 it is perfectly open to the Tribunal to make findings on either a contingent or different
8 set of permutations basis. That, in my submission, is a pragmatic answer to the
9 concern that Mr Schaefer has.
10 **THE CHAIRMAN:** So, sorry, the court was assuming, sorry, I am misunderstanding
11 this. The court was assuming that -- they weren't determining dominance --
12 **MR O'DONOGHUE:** Yes.
13 **THE CHAIRMAN:** -- they were assuming Google was dominant and they point out
14 that it has been denied in paragraphs 41 and 42. So this was just a trial on liability, if
15 that's the right word.
16 **MR O'DONOGHUE:** Yes.
17 **THE CHAIRMAN:** Then at 106, they are having regard to the extent of Google's
18 assumed dominance, I see.
19 **MR O'DONOGHUE:** Something was assumed in the claimant's favour that they were
20 not just dominant, that they were perhaps a monopolist --
21 **THE CHAIRMAN:** Yes.
22 **MR O'DONOGHUE:** -- and that inured to the benefit of the claimant, so was
23 an assumption in their favour.
24 **THE CHAIRMAN:** One sort of feels Google might have had an uphill struggle to say
25 that they weren't dominant, I don't know enough about the case, but one can imagine
26 those cases where there are very difficult questions of abuse --

1 **MR O'DONOGHUE:** Yes.

2 **THE CHAIRMAN:** -- and prima facie the dominance looks likely.

3 **MR O'DONOGHUE:** Yes.

4 **THE CHAIRMAN:** The court in those cases might say well, look, let's just hear this
5 more difficult question of abuse.

6 **MR O'DONOGHUE:** Yes.

7 **THE CHAIRMAN:** And the whole action may or may not be disposed of expeditiously.
8 It looks to me like this is one of those cases.

9 **MR O'DONOGHUE:** Maybe so, one can never peer into the mind of a judge --

10 **THE CHAIRMAN:** No.

11 **MR O'DONOGHUE:** -- but there may be some truth in that.

12 **THE CHAIRMAN:** Yes.

13 **MR O'DONOGHUE:** Sir, your point, we pick this up at 139, the alternative case,
14 page 172:
15 "... the introduction of the new-style Maps OneBox ... did not ... have an appreciable
16 effect in taking custom away from Streetmap. In the light of that, I conclude that it was
17 not reasonably likely to give rise to anti-competitive foreclosure."
18 Although in this case, as we saw at 43, the downstream online mapping markets was
19 not formally and finally defined, the court was nonetheless able to make a clear finding
20 of a lack of anti-competitive effect, and therefore no liability, or at least no causation.
21 Sir, just over the page at 141 the judge says:
22 "That is sufficient to dispose of the allegation of abuse. However, in case I should be
23 wrong in my conclusion I proceed to consider the issue of objective justification."
24 Again, that is another example of where the court can make contingent assessments
25 to cater for the possibility that the claimant has put forward a different permutation or
26 there may be some potential variability in the conclusion, depending on the

1 assumptions applied. So the court can and does pragmatically deal with those points
2 by applying assumptions, or dealing with issues on a series of contingencies. So that's
3 the answer to my friend's concern.

4 Sir, one final point before I sit down. If we go back to my learned friend's skeleton,
5 paragraph 49, sir, he says:

6 "While Microsoft has cited a number of cases in which dominance was assumed for
7 the purposes of the preliminary trial, in none of them was an issue of market definition
8 material to the issues at that trial ..."

9 **THE CHAIRMAN:** Yes.

10 **MR O'DONOGHUE:** Sir, that isn't right, as we saw, based on Arriva and Streetmap.
11 Sir, we have dealt with this at length in 23(c) of our skeleton. So it was at H/3/554. So
12 we set out, sir, in the second half the same quotation. We say:

13 "However, this is based on a misreading of the relevant cases ..."

14 You see the analysis of the cases set out at some length there. So, sir --

15 **THE CHAIRMAN:** So your submission, sorry, is a very simple one. You say look, if
16 there are alternative ways of looking at the relevant market you just run it as --

17 **MR O'DONOGHUE:** Then can be accommodated at the first trial.

18 **THE CHAIRMAN:** -- an alternative. That is no different to a damages inquiry, where
19 you might have alternative cases. That is the only principle you are trying to get out
20 of this, as I understand it?

21 **MR O'DONOGHUE:** Yes.

22 Sir, finally, as you I hope picked up from our skeleton, we have made an offer to the
23 claimants that there could be further thrashing out of the market definition and
24 dominance issues in what we call a schedule of assumptions.

25 **THE CHAIRMAN:** Yes, I saw that.

26 **MR O'DONOGHUE:** That has been criticised as being an exercise in hand waving,

1 I am not clear what that means, it is a genuine offer and it remains on the table.

2 **THE CHAIRMAN:** To what extent are the economic considerations which will feed
3 into determining dominance, to what extent is there going to be overlap with the
4 substantive abuse allegations, and particularly the effect on the market of any
5 proposed abuse? Is there, in your submission, overlap or is there no overlap or is it
6 evidentially correct, I appreciate you say you can take off the question of dominance,
7 but is there going to be an evidential overlap between the evidence that is necessary
8 for dominance and the evidence that's necessary for abuse, or for that matter for
9 quantum?

10 **MR O'DONOGHUE:** Sir, we say no. One can see, based on the pleaded case, the
11 amended particulars of claim, that it is a series of really quite distinct factors, such as
12 market shares, network effects, customer loyalty and so on. That's on the
13 dominance/market definition side. I will come to this later in the disclosure application
14 that we have, but on the question of abuse on the pleadings it is really quite a distinct
15 issue, which is essentially: what is the universe of potential supply of these licences?
16 How much, if any, of that supply was affected by these alleged restrictions? And what
17 was the demand, if any, for these second-hand licences? Our case in a nutshell is
18 that there was enormous unaffected supply that far exceeded demand and therefore
19 had no effect on the market, but it is a very different kind of exercise.

20 **THE CHAIRMAN:** When you say the relevant market may be the second-hand
21 licences, which you put out there as a possibility as something you may or may not
22 choose to argue.

23 **MR O'DONOGHUE:** Yes.

24 **THE CHAIRMAN:** That would seem then -- you start then having to look at what the
25 market for second-hand licences is and how it relates to the primary market and indeed
26 to the online market. Those seem to be considerations which potentially bleed into --

1 **MR O'DONOGHUE:** Well sir, we say not quite. What one is looking at is this claimant
2 is in the business of acquiring these licences and reselling them. What we would want
3 to interrogate in some detail for the relevant period is did they in fact experience any
4 difficulties in accessing this supply of licences? What were those difficulties? And
5 was there demand for the supply that this claim was not made available to them as
6 a result of these alleged restrictions?

7 That is a pretty self-contained set of questions that doesn't really turn on the finer
8 points of this or that market. In a nutshell, sir, they are saying these restrictions cut off
9 their oxygen and stopped them reselling and that is a pretty self-contained set of
10 questions which go to supply and demand and what were they doing in the market
11 and were they in fact restricted and were there in fact customers out there who were
12 unable to buy, because of these alleged restrictions, licences they otherwise would
13 have purchased? That is essentially a factual question which is self contained.

14 Sir, those are my submissions in support of the application.

15 **THE CHAIRMAN:** Mr Schaefer.

16 Mr Schaefer, can I just start by asking you perhaps, so Mr O'Donoghue is saying he
17 is going to, potentially, have a real go at dominant position, however good or bad you
18 feel those arguments are. He says he is going to, maybe going to spend, or between
19 you you are going to have to spend 2 to 4 million. He is also submitting that look, if
20 this matter, if you win on dominance, you know, probably, if you win on abuse we are
21 probably not going to fight dominance. That is one potential interpretation of his hint.
22 Just explain to me why that's not attractive for you.

23 **MR SCHAEFER:** Indeed.

24 **THE CHAIRMAN:** You will benefit from that very substantial saving.

25 **MR SCHAEFER:** Perhaps I could take that in reverse order.

26 **THE CHAIRMAN:** Yes, of course you can, yes.

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Submissions by MR SCHAEFER

MR SCHAEFER: The first point is we have always accepted and we continue to accept and we have never walked back from the proposition that dominance per se is capable of being hived off.

We have a separate argument about whether Microsoft, given its refusal to come clean on its own case, really has enough basis to say that it will produce a significant saving at this point. But we do not dispute that dominance can be hived off. That has happened in cases. That is fine.

The issue we have is with market definition. Because in this case, unlike in all of the cases to which my learned friend has referred you, we are alleging what we say is Microsoft's abuse of its dominant position, but also anti-competitive agreements entered into by Microsoft have had anti-competitive effects on the same relevant market that we say Microsoft is dominant in.

So where it is proposed that the Tribunal conduct a trial of all of the liability issues, those have to include the effects on competition, as my learned friend agrees. But here, unlike in all the other cases, it is the same market that you would be looking at for dominance. So in all of the other cases there was an upstream market.

THE CHAIRMAN: Yes, just explain this a bit more.

MR SCHAEFER: Sorry, indeed.

Commonly in competition law one has the concept of an upstream and a downstream market.

THE CHAIRMAN: Mm-hm.

MR SCHAEFER: For example, in the Network Rail case it was alleged that Network Rail was dominant on an upstream market and it was essentially the market for access to -- I can give you the precise details, but essentially market for access to Network

1 Rail infrastructure in the UK, it was controlling that. That was hived off and the
2 definition of the market on which it was said to be dominant, the upstream market, was
3 hived off. But what was not hived off was the definition insofar as it mattered of the
4 market on which that abuse, the alleged abuse of dominance, was said to have effects.
5 We will be asking the Tribunal to look at the effects on competition in the market for
6 desktop operating systems and Office productivity suites. Our case, and
7 Mr O'Donoghue has suggested for the first time that there is some unclarity about this,
8 but we are not suggesting that there is a separate market, a separate downstream
9 market for pre-owned licences which is hived off. The very point of our case is that
10 we are competing with Microsoft for the provision -- in the supply of desktop operating
11 systems.

12 **THE CHAIRMAN:** Yes, that's your case.

13 **MR SCHAEFER:** Yes.

14 **THE CHAIRMAN:** I thought he was saying that you might not be right about that.

15 **MR SCHAEFER:** Well, that's a different issue --

16 **THE CHAIRMAN:** Right.

17 **MR SCHAEFER:** -- and I have no idea what his case is on that because so far they
18 have failed to plead anything at all in response.

19 **THE CHAIRMAN:** Indeed, **indeed, yes.**

20 **MR SCHAEFER:** Our case is this is the same market. So when we are asking the
21 Tribunal in trial 1 on Mr O'Donoghue's proposal to look at the effects of competition on
22 a market, that is the very same market Mr O'Donoghue is saying should be hived off,
23 the definition of which should be hived off to trial 2.

24 That's the issue in a nutshell and I can come back and show you why
25 Mr O'Donoghue's -- sorry.

26 **THE CHAIRMAN:** You are saying you are going to have to -- I understand that in

1 broad terms, but you are saying you are going to have to define and consider that
2 market in any event on the question of abuse?

3 **MR SCHAEFER:** Precisely, sir.

4 **THE CHAIRMAN:** Why do you have to define it so precisely on the question of abuse?
5 Why can't you just say Mr O'Donoghue is suggesting you say this is the relevant
6 market, you may have an alternative case, you may even have three cases of what
7 you say the market is, why do you then need to define the market so precisely when
8 it comes to abuse? That's the bit I am just not quite understanding at the moment.

9 **MR SCHAEFER:** It is a very fair question, because one may not. It is entirely possible
10 and it happens in some of these cases that the Tribunal or the court looking at the
11 issue of abuse or restrictive agreements can say, "Well, I can assess this without
12 reaching a very precise definition of the market", and that does happen. But we have
13 a pleaded case in which Microsoft --

14 **THE CHAIRMAN:** Here the only nuance in the market -- sorry I am trying to make
15 sure I understand, I am not interrogating you, I am just trying to understand. The only
16 issue that the parties have identified in, or focused on in this respect is whether the
17 market is new and used licences, if I can put it that way, or whether used and new
18 licences are to be considered separately. That seems to be what the focus is on. Am
19 I misunderstanding?

20 **MR SCHAEFER:** I can come back to this as well. The reason I am hesitating is to
21 repeat the point. We have pleaded a case on market definition with which Microsoft
22 has not engaged. There are some criticisms --

23 **THE CHAIRMAN:** I know they haven't engaged, but let's assume they are taking that
24 point for the purposes of the current --

25 **MR SCHAEFER:** Yes. If there is a dispute as to the definition of the market and the
26 definition of the market is material to the first trial, that needs to be determined. It may

1 be that the Tribunal can decide well, I don't need to decide between these options
2 because I can safely conclude either that there has or there hasn't been
3 an anti-competitive effect on the market, leaving the market a bit fuzzy.

4 **THE CHAIRMAN:** Why might the market definition be relevant to the first trial?

5 **MR SCHAEFER:** Because the question is: has there been a restriction of competition
6 on the relevant market? That requires the Tribunal to identify the relevant market and
7 look at competition within that market. That's the very question in issue.

8 **THE CHAIRMAN:** Just say that again. Has there been a?

9 **MR SCHAEFER:** The allegation is that Microsoft's conduct -- I can show you this in
10 the pleadings -- has produced anti-competitive effects in the relevant markets, and that
11 is the question that will need to be addressed, or part of the question that will need to
12 be addressed, on liability. So the Tribunal can --

13 **THE CHAIRMAN:** Sorry, there is still a bit I am not understanding. I understand your
14 point that the relevant market is the same in both cases, on your case. Let's assume
15 the Tribunal says actually we think the relevant market is old licences, used licences,
16 if that's the right term, and we disagree with you that they are the same market. So
17 for dominance you look at the broader market. For abuse you look at the narrower
18 market. Why does that matter? Why is that in any way --

19 **MR SCHAEFER:** That is positing a first trial in which the Tribunal does make
20 a decision about the definition of the --

21 **THE CHAIRMAN:** It is making a decision on the market for abuse, but it is not
22 necessarily the same arguments as the relevant market for dominance.

23 **MR SCHAEFER:** Yes, fundamentally -- fundamentally our point is the definition of the
24 market, on which we say the abuse has taken place, is material to the first trial.

25 It may be that there is an entirely different upstream market. We have not contended
26 that. Microsoft has no case on it at the moment. I think all we are saying, ultimately,

1 is that market definition needs to be dealt with in the first trial for that purpose.
2 Now, if a second trial were justified, if there were enough savings to justify a second
3 trial, and Microsoft wanted to say all right, we see the basis on which the first trial
4 proceeded on abuse but we say there is a different, you need to look at a different
5 market to assess dominance that would be another issue.

6 Again, I am shadow boxing here. There is no pleaded case from Microsoft on any of
7 these issues. We have a square pleaded case, we say you are dominant in these
8 markets and that is restricting competition in the same markets. At the moment that
9 is all we have to work with.

10 **THE CHAIRMAN:** Mm-hm.

11 **MR SCHAEFER:** I wonder if it might be helpful at this stage to -- I am sorry you are
12 being overloaded with additional authorities -- hand up one more decision. My learned
13 friends knows I am going to give this to you.

14 **(Handed)**

15 My learned friend showed you the CMA's decision in Hydrocortisone, and that's
16 a regulatory decision about the pharmaceutical market in which --

17 **THE CHAIRMAN:** Yes, I am familiar with it, yes.

18 **MR SCHAEFER:** -- I had the pleasure of being led by Mr O'Donoghue, so you will
19 be aware that the market definition issues in that case are very complex and turn in
20 particular on a lot of regulatory questions.

21 The decision I have just handed up is another regulatory decision. It is, I suggest,
22 slightly closer to home. It is the Commission's decision in the Microsoft-LinkedIn
23 merger. I should be clear, I am not showing you this in order to try to establish what
24 is and isn't the correct market. But I do want to show you how the Commission, and
25 indeed Microsoft, approached questions of market definition in this case.

26 Just to give some context to the suggestion that this is all necessarily going to be

1 a horrendously complicated exercise. If you turn to page 2 you will see the section on
2 relevant markets.

3 **THE CHAIRMAN:** Mm-hm.

4 **MR SCHAEFER:** A number are identified, and we are really concerned with the
5 first two.

6 The first is PC operating systems. So desktop, as opposed to mobile operating
7 systems.

8 **THE CHAIRMAN:** Mm-hm.

9 **MR SCHAEFER:** You will see the Commission explains what those are. It explains
10 that Microsoft develops them. It says LinkedIn doesn't develop any. Then, over the
11 page, it starts with the notifying party's view, that is Microsoft's view, and Microsoft
12 says:

13 "The market definition of operating systems can be left open but it suggests that mobile
14 operating systems provide some constraint on desktop operating systems."

15 Then the Commission says well, in a previous decision we found that they were
16 separate, in the Google decision we found that they were separate and for the
17 purposes of this decision we are going to operate on a conservative basis and assess
18 competition on the basis that the product market is for desktop operating systems.
19 That is at paragraph 15.

20 **THE CHAIRMAN:** Mm-hm.

21 **MR SCHAEFER:** Pausing there, regardless of whether that's an appropriate definition
22 or not in this case, it is plainly a definition that the Commission, and one assumes,
23 Microsoft being involved in this, found at least comprehensible. That is exactly the
24 first of the product markets we have pleaded in this case.

25 They then turn to the geographic market definition for the desktop operating systems
26 market. You will see at paragraph 16 Microsoft's position. It stated:

1 "The scope of the market for operating systems is at least EEA wide but could be
2 wider."

3 **THE CHAIRMAN:** Sorry, I am lost --

4 **MR SCHAEFER:** Sorry, this is recital 16 on page 3.

5 **THE CHAIRMAN:** Recital 16. Yes. Sorry, yes.

6 **MR SCHAEFER:** Again you have had suggestions from Mr O'Donoghue that the only
7 possible way to approach this is by some bottom-up assessment starting at least at
8 a national level, if not, I don't know, even smaller. But that is going to depend on what
9 the issues are between the parties. We don't know what Microsoft's position is,
10 because it hasn't said. But in this case Microsoft's position was the same as our
11 pleaded position. And unless and until there is some indication that it is going to depart
12 from that, I suggest you might be slightly hesitant to accept the contention that this is
13 going to be enormously complicated.

14 **THE CHAIRMAN:** Mr O'Donoghue sent me a decision that scares me that it is going
15 to be all very complicated and I will be tied up for weeks and months on this issue and
16 you are sending me ones showing me it is all very simple and I don't need to worry
17 about it?

18 **MR SCHAEFER:** Indeed, **and the only other difference is mine a decision that**
19 **concerns the precise product and geographic markets that we have pleaded and**
20 **Mr O'Donoghue's is about Hydrocortisone --**

21 **THE CHAIRMAN:** Yes, but as you rightly point out we don't know Microsoft's
22 position --

23 **MR SCHAEFER:** Indeed.

24 **THE CHAIRMAN:** -- and I am sure they have the talent to make it as complicated as
25 one could imagine if they put their minds to it, yes.

26 **MR SCHAEFER:** Indeed. **Had Microsoft pleaded a response saying, "You are**

1 wrong, it is not the EEA, every single regional or national market is completely
2 different", then there would be a basis to say there is going to be a very
3 complicated assessment of this. But at the moment we don't know what
4 Microsoft's case is. We do know what their case has been in the past.

5 **THE CHAIRMAN:** Your point that you have been making to me is the complexity is
6 going to be there irrespective of whether dominance is heard in the first trial or in the
7 second trial, because you say the relevant market has to be investigated in both cases.

8 **MR SCHAEFER:** I am saying that the relevant market must be investigated. I am
9 then saying there is a separate question as to how complicated that is going to be.

10 **THE CHAIRMAN:** If relevant market is considered in the first trial, what complexity
11 does that involve? The same complexity as for the analysis for dominance, or?

12 **MR SCHAEFER:** On our case, yes, because in our case they are the same markets.

13 **THE CHAIRMAN:** On your case yes.

14 **MR SCHAEFER:** And we don't know what --

15 **THE CHAIRMAN:** I will take that as a given, you don't have to say it every time.

16 **MR SCHAEFER:** I am sorry, the trouble is it is the answer to so many questions.

17 **THE CHAIRMAN:** Yes.

18 **MR SCHAEFER:** You will see, in the end, paragraph 18, for this purpose, informed
19 by Microsoft's own position, the Commission concludes that there is an EEA market
20 for desktop operating systems, which is exactly what we have pleaded. Again, part of
21 the point I am making here is not whether this is right or not, but that the position taken
22 by Microsoft that our case is insufficiently particularised and they can't even
23 understand it is, I suggest, quite surprising on that basis.

24 Then in 3.2, the second product market is productivity software, this is recital 19,
25 software consisting of applications that enable users to create documents, databases,
26 graphs, worksheets for presentations and so on. It explains that Microsoft's own

1 product is Office.

2 Again, we have pleaded the relevant product market in Office productivity suites.

3 I suppose there is a subtle distinction there in that we have pleaded suites rather than

4 individual products, that may be a refinement that could be made, but it is the same

5 thing.

6 Then Microsoft says well, it should be left open. And over the page the Commission's

7 assessment.

8 **THE CHAIRMAN:** Yes, I mean I am finding this of limited assistance. Are there any

9 principles you want to get out of this?

10 **MR SCHAEFER:** Yes, the single principle -- well, there are two principles I wish to

11 take from this.

12 Firstly, that this entire procedure proceeded on the basis that the product markets that

13 we have pleaded were not only correct but at least comprehensible. Microsoft says it

14 doesn't understand our pleading.

15 The other point is this is a few paragraphs, this is not Hydrocortisone.

16 **THE CHAIRMAN:** Yes.

17 **MR SCHAEFER:** Sir, where I propose to go from here is first to take you through the

18 pleaded cases. Our pleaded case and Microsoft's pleaded case and I will try to do

19 that relatively shortly.

20 **THE CHAIRMAN:** Yes, I have looked at the pleadings but by all means draw my

21 attention to anything that's ...

22 **MR SCHAEFER:** Sir, our particulars of claim is at A/2.

23 **THE CHAIRMAN:** Yes.

24 **MR SCHAEFER:** You will see this is an amended version, but all of the black text is

25 unchanged from the version served in May 2021.

26 **THE CHAIRMAN:** Mm-hm.

1 **MR SCHAEFER:** If you start at paragraph 39, page 20.

2 **THE CHAIRMAN:** Mm-hm. Yes.

3 **MR SCHAEFER:** You will see our pleading.

4 **THE CHAIRMAN:** Yes.

5 **MR SCHAEFER:** Paragraph 40 pleads the relevant product market in a way very
6 similar to what I have just shown you in the Commission's decision.
7 Paragraph 41 says that geographic markets are the relevant territories, which is
8 defined earlier as the EEA plus the UK.
9 Just for your reference, Microsoft's response to this is, "This is insufficiently
10 particularised, we can't plead back to any of it". That is at --

11 **THE CHAIRMAN:** Yes, I have that.

12 **MR SCHAEFER:** -- paragraph 41 its defence.

13 **THE CHAIRMAN:** Yes.

14 **MR SCHAEFER:** There is then dominance, and Mr O'Donoghue has shown you our
15 case on dominance. It may be that Microsoft wishes to take issue with some of these
16 allegations, I don't know, so in the current pleading that it, because, and I can give you
17 the reference for this as well, I'm sorry, this is defence 42, because the pleaded
18 relevant markets are insufficiently particularised, we can't plead back on dominance.
19 That's the only thing they have said.

20 **THE CHAIRMAN:** Mm-hm.

21 **MR SCHAEFER:** One then gets on, and this is I think what you were asking me about
22 earlier: how does this feed into liability? If you turn to page 22, section D.

23 **THE CHAIRMAN:** Yes.

24 **MR SCHAEFER:** You will see this is where we set out the factual allegations about
25 Microsoft's conduct. We say it amounted to a campaign to keep pre-owned licences
26 off the market, and Microsoft denies that.

1 The central part of this, which I would emphasise, is that what we plead in paragraphs
2 46 to 52 are in the main part contractual agreements between Microsoft and its
3 customers, which we say were anti-competitive.
4 That's important, because I do want to emphasise this is a case about anti-competitive
5 agreements as well as abuse of dominance. They are separate allegations.
6 Then at paragraph 53, page 25 we get to the effects of the campaign. You will see at
7 53 we say:
8 "By requiring customers to accept one or more of the impugned terms in exchange for
9 discounted subscriptions Microsoft has effectively been paying those customers via
10 those discounts to protect Microsoft from competition by restricted the supply of
11 pre-owned licences to the competitors."
12 Then we say:
13 "Indeed, if they did supply such competitors, those customers would, indirectly,
14 themselves compete with Microsoft. Microsoft is thus paying potential competitors not
15 to compete with it."
16 That is, in a way, in a nutshell, the complaint in a nutshell.
17 If I can show you what the defence says about that, this is A/3, page 60.
18 **THE CHAIRMAN:** Mm-hm.
19 **MR SCHAEFER:** This is where we talk about the effect on the market:
20 "The second and third sentences [those are the ones I just read to you] are contingent
21 on the definition of the relevant markets."
22 **THE CHAIRMAN:** Sorry, I beg your pardon, I am catching up.
23 **MR SCHAEFER:** Sorry, apologies, this is tab A/3, page 60.
24 **THE CHAIRMAN:** I have that, which paragraph?
25 **MR SCHAEFER:** Paragraph 54.3, bottom of the page. Second and third sentences --
26 **THE CHAIRMAN:** He is responding --

1 **MR SCHAEFER:** I beg your pardon.

2 **THE CHAIRMAN:** They are responding to which paragraph here? Paragraph 53 is
3 the one you have just shown me, yes.

4 **MR SCHAEFER:** Yes, I am sorry, and Mr O'Donoghue has asked me to read 54.2,
5 which I should do.

6 **THE CHAIRMAN:** Yes.

7 **MR SCHAEFER:** Microsoft is denying -- well, Microsoft is denying that it restricted the
8 supply. This is in part a depreciability argument, but when we get to the last two
9 sentences which is the conclusion of paying competitors not to compete, it says well,
10 that's contingent on the definition of the relevant market.
11 That is why I am saying, as in any case I submit is correct as a matter of principle, that
12 one does need to deal with relevant market for a trial of liability, leaving aside
13 dominance. Indeed that's Microsoft's case. Microsoft isn't saying carry out the first
14 trial without regard to the relevant market, it is saying you assume it and then that
15 assumption can get unpacked in the second trial.

16 **THE CHAIRMAN:** Mm-hm.

17 **MR SCHAEFER:** That's the issue.

18 **THE CHAIRMAN:** Why can't you assume it -- so you assume it for the purposes of
19 dominance and abuse in the first trial, what's wrong with that?

20 **MR SCHAEFER:** The issue is that if the first trial proceeds on an assumption as to
21 relevant market and does conclude that Microsoft is liable --

22 **THE CHAIRMAN:** Yes.

23 **MR SCHAEFER:** -- either for abuse, subject to dominance or simply for having
24 entered in to anti-competitive agreements. Then the assumption on which the first trial
25 proceeded is unpicked at a later trial.

26 **THE CHAIRMAN:** Yes, but that applies to if the relevant market is only relevant for

1 dominance, that unpicking problem arises. No?

2 **MR SCHAEFER:** No, because in the second trial Microsoft is saying well you deal
3 with the relevant market and dominance together. So dominance isn't proceeding on
4 that point on assumption.

5 **THE CHAIRMAN:** Okay, irrespective of this pleading, as I understand it your
6 complaint in any event is that if dominance is -- sorry, I think I misspoke, which is why
7 you misunderstood my question.

8 If the relevant market for the purpose of dominance is pushed off to a later trial, trial 2,
9 and is then unpicked, that's a mess. Mr O'Donoghue says that's a mess, you lose, or
10 is not a mess at all, he says you lose.

11 **MR SCHAEFER:** Yes.

12 **THE CHAIRMAN:** You say not so, it means we have to then go back and try and redo
13 aspects, if not the whole of trial 1. That's your position.

14 You are now making the same point as I understand it in relation to paragraph 54.3,
15 this problem of if you make findings on one assumption and then the assumption turns
16 out to be wrong. In your case that means you have to go back, on Mr O'Donoghue's
17 case that means you lose.

18 **MR SCHAEFER:** Apologies, I think I have managed to confuse myself.

19 What I am submitting --

20 **THE CHAIRMAN:** Yes --

21 **MR SCHAEFER:** -- is that any findings about abuse or restrictive effects in general in
22 the first trial that proceeds on an assumption that is then unpicked in the second trial --

23 **THE CHAIRMAN:** Yes.

24 **MR SCHAEFER:** -- can lead to a mess. I am not saying the second trial in itself will
25 be a mess about the dominance case.

26 **THE CHAIRMAN:** No, no, absolutely, I am probably not expressing myself well, but

1 I think I understand your submission.

2 But Mr O'Donoghue's answer to that is well, it is done on an assumption. If you want
3 to put it in alternative ways, you can.

4 **MR SCHAEFER:** Yes. That's the position and that's what I would like to address now.

5 **THE CHAIRMAN:** Yes.

6 **MR SCHAEFER:** If I can boil this down to some basic propositions.

7 Firstly, it is not inherently problematic to hive off dominance per se. I have said that
8 already.

9 **THE CHAIRMAN:** Yes.

10 **MR SCHAEFER:** It is often in both parties' interests, because often the elephant in
11 the room is if a company is being sued for abuse of a dominant position and it has lost
12 on everything else it may be quite keen to avoid the court making a finding about
13 whether it is dominant in the market. So you do often get -- Mr O'Donoghue is right to
14 say you do often get that point not litigated.

15 Second proposition, where --

16 **THE CHAIRMAN:** Why is that? That is because it may impact other cases, is that
17 the --

18 **MR SCHAEFER:** I suppose in a Hollington v Hewthorn case it wouldn't, but I can't
19 speak for broader concerns of a finding like that.

20 **THE CHAIRMAN:** Right.

21 **MR SCHAEFER:** The second proposition, where there is an issue of market definition
22 that only goes as to dominance, that can be hived off alongside dominance.

23 I have said already that is exactly what happened in the four cases Mr O'Donoghue is
24 relying on.

25 The third proposition, what is not sensible or practical is as I have said to hive off into
26 a second trial the definition of the very market where the effects on competition are

1 being assessed in the first trial.

2 **THE CHAIRMAN:** I am not complaining, I just looked at the --

3 **MR SCHAEFER:** I don't know if there is a point at which the transcribers would like
4 a break.

5 **THE CHAIRMAN:** Yes, that might be a good idea.

6 Amy, if we could have five minutes that would be helpful, thank you.

7 **(12.00 pm)**

8 **(A short break)**

9 **(12.08 pm)**

10 **MR SCHAEFER:** Sir, where we were, I think, was addressing the issue of whether if
11 there is an assumption in trial 1 on the basis of which trial 1 proceeds that is unpicked
12 in trial 2, does that create a mess or is that simply tough luck for the claimant? What
13 I would like to do on that is show you the Compare the Market case to which I refer in
14 the skeleton, which is in tab 12 of the authorities bundle.

15 I hope you will forgive me for taking this -- I will try not to spend forever, but I hope you
16 will forgive me for showing you in this quite some detail --

17 **THE CHAIRMAN:** Yes, sure.

18 **MR SCHAEFER:** -- but in my submission this does answer the question and is quite
19 a fundamental issue. This was an appeal from a decision of the CMA which found
20 that Compare the Market had entered into anti-competitive agreements. That was one
21 of the points Mr O'Donoghue made, he said this is a case about anti-competitive
22 agreements. So is our claim. We are claiming for that as well as abuse of dominance.
23 It might be easiest to see the shape of this very long judgment if you start with the
24 table of contents on page 418. Just looking at the largest headers, you will see there
25 is a quite a lot of background set out over A to E. Then over the page, F, you get the
26 first ground of appeal against the CMA's decision, and that is flawed market definition.

1 That is about 60 pages of decision.

2 Then at G you get the second ground, which is effective coverage. We can pass over
3 that because that didn't go anywhere.

4 Then at H you get grounds 3 to 6, no basis for an effects conclusion. Those grounds
5 are saying essentially that the CMA was wrong to find that the agreements in issue
6 had anti-competitive effects on the relevant market.

7 What I want to show you in short is that ground 1 there, flawed market definition, on
8 which the appellant succeeded, did not work as a freestanding ground of appeal,
9 although there was a suggestion by the appellant that it should. It wasn't sufficient in
10 and of itself for the appeal to succeed but it did affect the analysis of the other grounds,
11 grounds 3 to 6.

12 Sir, if you could turn up page 437 you will see at paragraph 33 at the bottom of the
13 page the Tribunal starts by summarising the substantive grounds of appeal. The first
14 of those, (i), ground 1, wrong definition of the relevant market, asserts:

15 "The market definition adopted by the CMA in the decision was flawed. Market
16 definition matters because it sets the scene in which the effect of the allegedly
17 anti-competitive agreement or provision can be gauged."

18 That may be a neater answer to the question that you asked me
19 yesterday -- yesterday! A few minutes ago:

20 "In the notice Compare the Market contends ..."

21 Then there is a quote from the notice of appeal.

22 64 explains how the CMA defines the relevant market in its decision.

23 65 says:

24 "This definition underlies important aspects of the CMA's effects analysis ..."

25 Then there is some detail which we can helpfully skip over:

26 "Insofar as the CMA materially erred in its market definition therefore the decision on

1 | adverse effects cannot ..."

2 | **THE CHAIRMAN:** Sorry, where are you now?

3 | **MR SCHAEFER:** I apologise, I am at the citation at paragraph 65, at the top of 438.

4 | **THE CHAIRMAN:** The last sentence, I beg your pardon.

5 | **MR SCHAEFER:** "... cannot stand."

6 | **THE CHAIRMAN:** Yes.

7 | **MR SCHAEFER:** That is essentially Mr O'Donoghue's contention, if you knock out
8 | market definition then findings of liability based on that definition fall away.

9 | The Tribunal carries on:

10 | "Clearly it will be necessary to consider the substance of the CMA's market definition
11 | in some detail. We would only observe at this stage that the last sentence of
12 | paragraph 65 of the notice just quoted overstates matters. It was common ground
13 | between the the parties and we agree that market definition is an important tool in
14 | assessing the existence of anti-competitive effects. Getting it wrong may materially
15 | undermine a conclusion that there had been anti-competitive effects, but that is not
16 | necessarily the case. It is perfectly possible, even using an incorrect market definition,
17 | to discern such an effect. That's because market definition is not concerned with
18 | effects but merely in identifying the context in which these effects are to be presaged.
19 | We therefore don't accept that even if the CMA incorrectly defined the market it
20 | automatically follows the decision cannot stand, although it is certainly a good start."

21 | That is really the point in a nutshell, but I can show you that point play out.

22 | **THE CHAIRMAN:** Okay, so what's your submission? What do you get from this?

23 | **MR SCHAEFER:** What I get from this --

24 | **THE CHAIRMAN:** This could play in a number of different ways.

25 | **MR SCHAEFER:** I am sorry, sir.

26 | **THE CHAIRMAN:** This could play in a number of different ways. What are you relying

1 on this for?

2 **MR SCHAEFER:** The submission is that if a regulator or a court reaches a conclusion
3 about effect on a market that is based on one definition of the relevant market, and
4 that definition of the relevant market turns out to be wrong it doesn't automatically
5 follow that the conclusions on competitive effects were wrong, it means they have to
6 be reexamined.

7 **THE CHAIRMAN:** Okay, so that's consistent with Mr O'Donoghue's position that this
8 could all go off, because you don't need to worry too much about it. Because if you
9 have it slightly wrong, so what? It doesn't mean that the decision will be wrong. You
10 are saying the relevant market is relevant to abuse, and the reason for hearing
11 dominance heard at the same time as abuse, so you get the market tightly defined.
12 Mr O'Donoghue -- well, let's not worry about Mr O'Donoghue.

13 You are now showing me authority which says look, if that, if in arriving at the market
14 in trial 1 you are slightly awry, that is not necessarily fatal when you come on to trial 2
15 and nuance that market in which you are dominant.

16 **MR SCHAEFER:** Yes.

17 **THE CHAIRMAN:** I understand why you are showing me this, because you have a far
18 greater concern that you don't want to get boxed in if these trials are split, but this
19 authority seems on its face to be supportive of the proposition that the question of
20 market definition can indeed be put off to a later trial.

21 **MR SCHAEFER:** Sir, with respect, no, I don't think it is supportive of that.

22 **THE CHAIRMAN:** Okay, you are going to have to take that with some care.

23 **MR SCHAEFER:** Yes, let me break this down.

24 Mr O'Donoghue is proposing a process whereby trial 1 determines, you say abuse,
25 I want to remind you well, anti-competitive agreements.

26 **THE CHAIRMAN:** Yes, I understand that, yes.

1 **MR SCHAEFER:** By reference to an assumption about the relevant market.
2 And a second trial in which that assumption also relevant to dominance --

3 **THE CHAIRMAN:** Is tested.

4 **MR SCHAEFER:** -- is tested, yes.
5 Mr O'Donoghue says, as I understand him, our complaint is, our concern is, if trial 2
6 unpicks the market definition in trial 1, the findings in trial 1 are undermined, but that
7 doesn't mean we lose. It means you have to go back --

8 **THE CHAIRMAN:** Yes, I understand that, but we are not deciding that today. That
9 point is not --

10 **MR SCHAEFER:** That is the objection to the split trial.

11 **THE CHAIRMAN:** Right, you are saying -- yes, you are saying -- Mr O'Donoghue says
12 tough, you say you go back and unpick the original trial.

13 **MR SCHAEFER:** Mr O'Donoghue says there are savings to be made because you
14 could have only one trial, but his mechanism --

15 **THE CHAIRMAN:** You might be making the submission to me that if Mr O'Donoghue
16 is right there is potentially an injustice in making you have to go forward on
17 an assumption as to the relevant market when that hasn't been determined by the
18 court. You could be saying that that leads to potential injustice and that's a reason
19 why these trials should not be split up. But you are in fact taking the opposite view,
20 you are saying I don't need to worry about that because you are not going to be bound
21 and you can go back and unpick the first trial. It may be cumbersome to do so, but --

22 **MR SCHAEFER:** Yes, I am saying it could lead to a third trial.

23 **THE CHAIRMAN:** It could lead to a third trial, yes.

24 **MR SCHAEFER:** That is the reason for splitting the trial.

25 **THE CHAIRMAN:** It may, but it may not matter, for the reasons given in this passage
26 here. It may not matter that you have it a bit wrong.

1 **MR SCHAEFER:** Well, there will have to be a decision as to whether it matters.

2 **THE CHAIRMAN:** Yes, the the only point I was putting to you, I was saying you may
3 not have to go back and unpick, it may be fine, you don't have to hit it perfectly.

4 **MR SCHAEFER:** I can go on to show you this in detail, but what would happen here,
5 what in my submission would have to happen as a matter of logic, is if the market
6 definition on which the first trial proceeded as assumption were unpicked, there would
7 have to be a decision as to whether that --

8 **THE CHAIRMAN:** Yes, of course, I understand that, I understand that.

9 **MR SCHAEFER:** Yes, and on that basis it is in our submission very hard to see how
10 a split trial can lead to savings when there is a risk of a third trial.

11 **THE CHAIRMAN:** Well, with all these split trials, they can lead to savings and equally
12 well if things play out a certain way they don't lead to savings. That is necessarily the
13 case in all split trials, is it not?

14 **MR SCHAEFER:** Sir, I mean that is -- and I think you have the fundamental point,
15 which is, and I can show you this in more detail, if you want me to go through the whole
16 judgment, but this is why Mr O'Donoghue's statement that we simply lose is wrong.

17 **THE CHAIRMAN:** Right. Yes. No, I understand your submission on that.
18 Mr O'Donoghue is correct, is he not, that if your claim of abuse fails in trial 1 there will
19 be substantial savings?

20 **MR SCHAEFER:** Yes, by definition, yes, by definition if we lose on the threshold point
21 in trial 1 that is the end of that.

22 **THE CHAIRMAN:** You say there will be no savings if you win.

23 **MR SCHAEFER:** Precisely.

24 **THE CHAIRMAN:** Yes.

25 **MR SCHAEFER:** And there may be --

26 **THE CHAIRMAN:** And there may be additional costs for all sorts of reasons, including

1 the fact that you have two trials, which is more expensive than having a single trial.

2 **MR SCHAEFER:** Or potentially three.

3 **THE CHAIRMAN:** Or potentially three, yes.

4 **MR SCHAEFER:** So you have the point.

5 Beyond that it is just a question of the evidence on the savings that Microsoft says
6 would arise from this. My very simple proposition is having shown you two competing
7 regulatory decisions, this could be enormously complicated, it could cost lots and lots,
8 depending on Microsoft's case. But at the moment when they have not pleaded back
9 at all on any of this, in my submission there just isn't a proper basis, or any real reason
10 for you to conclude that there would necessarily be huge complication and therefore
11 necessarily any reason for savings.

12 **THE CHAIRMAN:** Well, there will be savings. I mean the debate is how big those
13 savings will be.

14 **MR SCHAEFER:** Yes, if Microsoft does something very different from what it did in
15 LinkedIn and disagrees with us on the geographic market, there could be a lot of
16 argument to save. If it doesn't, there could be agreement and no issue between the
17 parties and not very much for the other trial at all.

18 **THE CHAIRMAN:** I understand.

19 **MR SCHAEFER:** Finally, the proposed solution to all this by Microsoft is that the
20 parties agree a schedule of assumptions about market definition and dominance.
21 I haven't dragged you back through all of the pleadings and the RFIs and everything
22 in detail, but I hope I have said enough times that Microsoft is simply not pleading back
23 on any of these issues.

24 **THE CHAIRMAN:** Mm-hm.

25 **MR SCHAEFER:** What it is asking you to do now is proceed on the basis that our
26 pleading is inadequate and needs clarifying, without ever having shown you how. In

1 my submission that is also simply not appropriate. So in short, those are my reasons
2 for inviting you not to accede to the application.

3 **THE CHAIRMAN:** I am grateful.

4 Mr O'Donohoe you seem to be hugely apart --

5 **MR O'DONOGHUE:** Yes.

6 **THE CHAIRMAN:** -- on whether you need to look at the market definition for the
7 purposes of abuse, which is a question I put to you and you said --

8 **MR O'DONOGHUE:** Yes, certainly.

9 **THE CHAIRMAN:** In the course of your submissions if you could make sure you pick
10 that up.

11

12 **Reply submissions by MR O'DONOGHUE**

13 **MR O'DONOGHUE:** Yes. I am going to be very brief, I only have a handful of points.
14 First, we have now crystal clear the concession that dominance can indeed be hived
15 off.

16 **THE CHAIRMAN:** Yes.

17 **MR O'DONOGHUE:** That is an important starting point. I am not quite saying I am
18 50 per cent there, but that is a substantial concession as a starting point.

19 Mr Schaefer I think also accepts that certainly in certain scenarios one can decide the
20 question of abuse without a precise definition of the relevant market.

21 He has an objection in this particular case, which I confess I don't fully understand, but
22 I will deal with that.

23 There are -- we say, as a starting point -- two important concessions. Indeed, in my
24 submission these concessions are realistic and unsurprising, because they are the
25 logical corollary of the splits that have been made with great success in other cases.

26 The argument that the sky would fall, that all these complications would manifest really

1 has no basis in any decided cases in which a split has been ordered to date. That too
2 is an important starting point.

3 **A couple of final points if I may. I am grateful to my learned friend for showing**
4 **you the pleading on the question of effect, because in my submission what this**
5 **really does is crystallise the crux of the point. That when we are looking at the**
6 **question of effect on competition it is really a different evidential and analytical**
7 **exercise to the anterior question of what is the relevant market. We can go back**
8 **to my client's defence, please. It is in tab 3 of the core bundle.**

9 Sir, we glanced at paragraph 54, internal page 60. We say in 54.2 in fact customers
10 were not required to accept the terms.

11 (b) they were free to choose what they wanted to do, including reselling if they wanted
12 to.

13 There are lots of other reasons why they would choose not to do so, (c).

14 Then (d) the proportion of the licences affected by the terms at issue is so small that
15 they have no or no material effect on the supply of second-hand licences.

16 Sir, you see the cross-reference to 36.2. If we can just jump back to that. Page 17.

17 You will see there are a whole series of reasons why we say in fact customers were
18 unlikely to onward supply their existing licences for second-hand resale purposes.

19 You see at (b) they kept these as backups, and so on.

20 These are a series of factual points as to why in fact these customers were, for
21 a variety of reasons, unwilling to onward supply their licences for second hand resale.

22 Then over the page at 39.2. We say at (a) the terms at issue were only offered in
23 respect two very limited and selective subsets of customers and agreements.

24 (b) terms are not imposed, eligible customers were free to take them or leave them.

25 (c) no monitoring system.

26 (d) never sought to enforce the terms.

1 (e) promptly ceased and so on.

2 Again, these are quite specific factual questions about what was happening in fact at
3 the customer level in terms of how these contractual provisions were applied. That
4 has nothing do with esoteric questions of market definition. It is a fairly straightforward
5 exercise of what were the customers doing, and what impact did that have.

6 The final reference, sir, if I may, it is at 46.3.

7 (a) the defendants are presently aware of approximately ten customers in the UK and
8 fewer then ten in the EU who were offered and accepted terms that included a discount
9 and so on. Again, a rather basic question: which customers were affected? How
10 many? And so on.

11 Sir, that is why we say one can see fair and square on the pleadings that the question
12 of the effect on competition, it is actually quite a basic question: which customers were
13 affected by these terms? What was the impact? So that's the supply question. Then
14 there is a demand-side component, which is well, on the assumption that they have
15 proven that supply limitation was caused by these restrictions, what is the demand
16 side of the equation? Were there customers out there who had demand for these
17 licences that exceeded supply such that these alleged restrictions limited the market
18 for the supply of secondhand licences?

19 That is the effect case in a nutshell, and it doesn't involve looking at these rather
20 specific questions. When one gets to relevant market one question often is well, if you
21 raised the price of this product by 5 to 10 per cent would the volume of customers who
22 would switch render the price increase self defeating such that the two products would
23 then be the same market? That is a completely different sort of question to the rather,
24 frankly, prosaic questions we will be considering in the context of the market.

25 **THE CHAIRMAN:** I understand those narrow points you make, they are sort of
26 causation points if you like. But Mr Schaefer is saying well, look, if you are distorting

1 competition in the relevant market, that relevant market is the same as the market in
2 which he is dominant in this case. And there are going to be overlapping questions in
3 both cases.

4 He points in particular to 54.3 of your defence --

5 **MR O'DONOGHUE:** Yes.

6 **THE CHAIRMAN:** -- where you seem to sort of pick this up, and say, the second and
7 third sentences are contingent on the definition of relevant market. That is a reference
8 back to paragraph 53, which we will perhaps just have a look at, perhaps. So it is 53:
9 "By requiring customers to accept one or more of the impugned terms in exchange for
10 discounted subscriptions Microsoft had been effectively paying those customers to
11 protect Microsoft from competition by restricting supply of pre-owned licences to
12 Microsoft's competitors."

13 That's an allegation of abuse.

14 **MR O'DONOGHUE:** Yes.

15 **THE CHAIRMAN:** At 54.3 you say you can't plead to it, because it is contingent on
16 the definition of "relevant market".

17 It may be that's unfortunate pleading, but if that is indeed the position, isn't that, on
18 your analysis, an overlap?

19 **MR O'DONOGHUE:** Yes. Well, sir, if one goes back to 53 of the particulars.

20 **THE CHAIRMAN:** Yes, 53 of your --

21 **MR O'DONOGHUE:** Which we are responding to here.

22 **THE CHAIRMAN:** Of the claimant's particulars, yes, let's get back to that.

23 **MR O'DONOGHUE:** They say the crux of the allegation is restricting the supply of
24 pre-owned licences and so on, and if they had those licences available second hand
25 they could then use them to compete with new licences. If one looks at where we deal
26 with the question of effect, that is exactly the same point. What we are saying at the

1 paragraphs I showed you and elsewhere is we do not accept that these alleged
2 restrictions did have the effect of restricting supply --

3 **THE CHAIRMAN:** No, I understand that.

4 **MR O'DONOGHUE:** -- of pre-owned licences.

5 **THE CHAIRMAN:** I understand that, but that is independent of the point we are on,
6 isn't it?

7 **MR O'DONOGHUE:** Sir, we say in fact we have in substance pleaded back to that
8 point.

9 **THE CHAIRMAN:** Right.

10 **MR O'DONOGHUE:** In any event, and this is really the answer to my learned friend's
11 objections, so far as we can even understand it, we saw in Arriva and Streetmap the
12 Tribunal is perfectly able to make a series of findings based on different contingencies
13 or permutations.

14 **THE CHAIRMAN:** Yes.

15 **MR O'DONOGHUE:** That is the answer to his point.

16 **THE CHAIRMAN:** I understand that.

17 **MR O'DONOGHUE:** If he has an alternative, or if we have an alternative, that can be
18 baked into the first trial and that does not require this expensive and esoteric
19 discussion of the metaphysics of the relevant market. We are looking at on
20 a bottom-up basis, what impact did this have?

21 **A couple of final points, very briefly.**

22 We are surprised to see this reference to LinkedIn, which I only received this morning.
23 If you have it, sir, in front of you.

24 **THE CHAIRMAN:** Sorry.

25 **MR O'DONOGHUE:** It is the Commission decision.

26 **THE CHAIRMAN:** Yes, I know. Yes.

1 **MR O'DONOGHUE:** Sir, if you look at paragraph 10, this is a merger, Microsoft
2 acquiring LinkedIn.

3 **THE CHAIRMAN:** Yes.

4 **MR O'DONOGHUE:** 10, LinkedIn does not offer operating systems.
5 21, LinkedIn does not offer productivity software.

6 In my submission it is not very surprising in a case where there was zero horizontal
7 overlap between LinkedIn and Microsoft in operating systems and productivity suites
8 that this Commission decision doesn't look at those two area in any detail. They didn't
9 need to.

10 **Indeed, sir, you will see from 22 that Microsoft's position is well, we can leave all**
11 **this open, because it doesn't matter in this case.**

12 With respect this is --

13 **THE CHAIRMAN:** Sorry, 22?

14 **MR O'DONOGHUE:** Yes:

15 "The notifying party [which is Microsoft] submits that the exact product market
16 definition should be left open."

17 This was a case in which the ambit of an operating system's market and/or productivity
18 suites were simply not in issue. So I don't understand what --

19 **THE CHAIRMAN:** Your submission is you might choose to take, for good reasons --

20 **MR O'DONOGHUE:** Yes.

21 **THE CHAIRMAN:** -- a different approach in this litigation than you did in the merger.

22 **MR O'DONOGHUE:** Yes, precisely.

23 Finally on Compare the Market, as you put fairly to Mr Schaefer, that case helps me,
24 it doesn't help Mr Schaefer, because what it shows is that the Tribunal can and does
25 decide the question of effect on the basis of certain other permutations or
26 assumptions. So it is capable of doing that, as happened in Arriva and to some extent

1 in Streetmap. We say this is a case in our favour, not a case against us.

2 **THE CHAIRMAN:** Very good.

3 I think what I am inclined to do is rise now and if we could, if that's not inconvenient to
4 anyone, we could sit, perhaps, at 1.45 and I will give judgment then.

5 **(12.34 pm)**

6 **(The luncheon adjournment)**

7 **(1.45 pm)**

8

9

Judgment (Extracted for approval)

10

11 **MR SCHAEFER:** Sir, I am grateful.

12 The remaining major two issues before you are directions to trial generally and
13 Microsoft's application for early disclosure from ValueLicensing. You could take those
14 in either order.

15 In my submission it might be better to deal with directions generally first, simply
16 because part of the point we make is that it is the context of agreed disclosure reports
17 against which the disclosure application has to be assessed.

18 **THE CHAIRMAN:** Yes, just remind me. You had agreed to give some early
19 disclosure, is that right, one of the categories?

20 **MR SCHAEFER:** Yes, Microsoft is applying for early disclosure in three categories.

21 The first is --

22 **THE CHAIRMAN:** Sorry, let me just find them.

23 **MR SCHAEFER:** Sorry, yes. That is in the bundle.

24 **THE CHAIRMAN:** I am looking in the skeleton.

25 **MR SCHAEFER:** At F/2 of the core bundle you will find the draft order.

26 **THE CHAIRMAN:** F/2, this is Microsoft's order?

1 **MR SCHAEFER:** Yes, Mr O'Donoghue will say that he should be introducing this
2 rather than me. These are three categories of disclosure that Microsoft is seeking
3 from ValueLicensing today.

4 In a nutshell our submission is --

5 **THE CHAIRMAN:** So there are three. You have agreed the fourth, is that right?

6 **MR SCHAEFER:** No, of the three we have agreed to provide documents that we are
7 currently aware of as falling within what's described there as part B. Microsoft says
8 that may not be good enough.

9 **THE CHAIRMAN:** Documents which you are aware of. Right, that's the -- there is
10 also dispute as to disclosure generally, isn't there? Timing and --

11 **MR SCHAEFER:** Sir, yes, there is the general dispute as to the timing of steps to trial,
12 including disclosure. It is agreed between the parties that there should be disclosure
13 reports and disclosure given in the usual way after that. One of the points we make
14 about the early disclosure application is that's going to lead to a lot of duplication at
15 this stage when there is no strong reason advanced, we suggest, for giving this
16 disclosure now. That is Mr O'Donoghue's application.

17 **THE CHAIRMAN:** Shall I hear Mr O'Donoghue's application first.

18 Is that convenient, Mr O'Donoghue, to hear your application?

19

20 **Application by MR O'DONOGHUE**

21 **MR O'DONOGHUE:** Sir, yes.

22 We start with these disclosure questions.

23 **THE CHAIRMAN:** Start with your three categories.

24 **MR O'DONOGHUE:** Yes, I am grateful.

25 Sir, the first two categories, I think, are quite brisk.

26 We start with A. You see, sir, the order in front of you. It is essentially the freedom of

1 information documents. Just to link this with the pleadings, it is in paragraph 22 of the
2 particulars.

3 **THE CHAIRMAN:** Sorry, paragraph 22?

4 **MR O'DONOGHUE:** Yes, of the amended particulars of claim. So they say:

5 "VL supplies and sells pre-owned Microsoft software from and to companies and
6 organisations in the private and public sectors."

7 **THE CHAIRMAN:** Mm-hm.

8 **MR O'DONOGHUE:** The public sector is one of two parts of their case. There seems
9 to be a suggestion that public sector bodies may be an important source of demand
10 for secondhand licences because they may be more cost conscious.

11 We then, sir, if we go to tab G of the core bundle, back in January of this year. It is in
12 tab 46.

13 **THE CHAIRMAN:** Sorry, G/46?

14 **MR O'DONOGHUE:** Yes. It is internal page 407.

15 **THE CHAIRMAN:** Yes.

16 **MR O'DONOGHUE:** You see, sir, the last sentence in the third full paragraph,
17 "Various public authority responses ..." Do you see that, sir?

18 **THE CHAIRMAN:** Yes.

19 **MR O'DONOGHUE:** It says:

20 "Various public authority responses to our ... FOIA ... requests identified ... our request
21 is relevant because FOIA responses have confirmed that Microsoft partners operating
22 in the UK and EU jurisdictions ... elsewhere, irrespective of where they are located,
23 were directly involved in selling subscriptions incorporating the Impugned Terms."

24 They rely on the responses to FOIA requests by the public authorities as part of their
25 case on the alleged restrictions. We have quite naturally in the light of this requested
26 to see the FOIA responses and the claimants have simply refused.

1 We don't understand in a nutshell any good reason for this refusal. They plainly have
2 the material readily to hand. As we see, they actively rely on it for their purposes.
3 FOIA requests, by their nature, are lawyer-driven requests and they must be available
4 in a very convenient and ready-made format. Unlike the other two categories, it has
5 not been suggested it would require any additional work to hand these over, so there
6 cannot possibly be a proportionality objection.

7 **THE CHAIRMAN:** Sorry, what are these, what were these requests going to? What
8 are they being relied on for? Sorry, I am being slow. Maybe I need to read back
9 earlier.

10 **MR O'DONOGHUE:** There is a suggestion made in the first sentence of the letter that
11 Microsoft's, what they call partners, these are the third parties, may have had had
12 some alleged role in this alleged campaign. Then they rely on the FOIA requests for
13 that purpose. So they rely on them for a slightly different purpose, but in any event
14 the responses which they rely on, we would like to see them. So there can't be
15 a proportionality concern. There is obviously no confidentiality issue, because these
16 are FOIA requests which are disclosure to the world at large, and indeed they could
17 publish them if they wanted to.

18 **THE CHAIRMAN:** Why are they relevant?

19 **MR O'DONOGHUE:** The public sector bodies are a source of supply and demand for
20 these secondhand licences. The extent to which public authorities are interested in
21 buying and selling secondhand licences is a key issue in this case, as we saw in
22 paragraph 22, public and private sector demand are said to be central to the supply
23 and demand equation.

24 **THE CHAIRMAN:** Right.

25 **MR O'DONOGHUE:** In terms of, sir, why do we need this now as opposed to when
26 we get disclosure in due course. We think it would be extremely helpful at this stage

1 to understand if for example there are public bodies who are uninterested in
2 purchasing secondhand licences, that would help focus disclosure.

3 If, by contrast, there are public bodies that are interested in purchasing secondhand
4 licences that would also be extremely helpful for disclosure. What it would do, in my
5 submission, is it would allow disclosure to focus on the public sector bodies that might
6 be of most interest in terms of the issues in this case.

7 **Indeed, at paragraph 38 of my friend's skeleton he says, and I quote:**

8 "VL does not dispute that documents relating to the Fol requests it has made,
9 concerning various public bodies' positions vis-a-vis pre-owned licences, are likely to
10 be relevant."

11 So the question of relevance is conceded. You will see, sir, the next sentence, there
12 is a proportionality hand waved, but given that these are sitting there and are ready
13 made we don't understand on what basis it would not be proportionate for them to
14 disclose those at this stage. It seems to involve no additional work whatsoever.

15 **THE CHAIRMAN:** There is no evidence from either side on this, is there?

16 **MR O'DONOGHUE:** Sir, no. Indeed on all three categories there isn't a shred of
17 evidence before the Tribunal on any of the proportionality grounds.

18 Sir, finally it is a very upside down approach to transparency that they seek this FOIA
19 material in the interests of transparency. They seek to deploy it in support of their
20 case. When we ask to see the rest of the basket of the cherries they say no. It does
21 lead one to wonder well, why don't they want to hand over this material? Certainly at
22 this stage. So we say on the FOIA stuff there is really no --

23 **THE CHAIRMAN:** Shall we deal with that category first, is that all right?

24 **MR O'DONOGHUE:** Yes.

25

26 **Submissions by MR SCHAEFER**

1 **MR SCHAEFER:** Dealing with this application first, this application of Microsoft was
2 made -- I will be corrected -- I believe on 26 April. By comparison our application for
3 further information was made on the 31 March. So this is not an application where
4 there has been time for swapping evidence. It came three days, I believe, before
5 skeletons were due.

6 The overarching point which goes to FOIA as well is this: in many cases what Microsoft
7 is asking for I would say very broadly defined and will require significant work to obtain,
8 but ValueLicensing isn't saying the relevance of most of these categories is disputed,
9 what it is saying is there is an agreed process of disclosure reports and EDQs. That
10 is the normal process under the CAT rules. In my submission one has to therefore
11 explain why it is reasonably necessary and proportionate to order disclosure in
12 advance that will add to the work that is already going to be done, and essentially for
13 all of these my learned friend says, "Well, it will help inform things going forward. It
14 will help inform the parties". The same could be said of anything.

15 **THE CHAIRMAN:** Just before we get to the meat, just explain, what were these
16 requests and who were they to, do you know?

17 **MR SCHAEFER:** ValueLicensing has made a number of freedom of information
18 requests of public bodies.

19 **THE CHAIRMAN:** Yes.

20 **MR SCHAEFER:** Largely aimed -- I will be corrected if I am summarising it
21 incorrectly -- at ascertaining whether they have in the past had perpetual licences and
22 if so what has happened to them. This is part of ValueLicensing's attempts to
23 investigate what it says is a campaign to suppress the availability of pre-owned
24 licences.

25 **THE CHAIRMAN:** How many jurisdictions are we talking about roughly, do we know?

26 **MR SCHAEFER:** I am told significant in the UK, but also in the rest of Europe.

1 **THE CHAIRMAN:** So 30 freedom of information requests? 30 odd?

2 **MR SCHAEFER:** Apparently, yes, I am told.

3 I am told there are 4,000 or 5,000 of these.

4 **THE CHAIRMAN:** 4?

5 **MR SCHAEFER:** Or 5,000.

6 **THE CHAIRMAN:** 5,000 requests?

7 **MR SCHAEFER:** In the thousands.

8 **THE CHAIRMAN:** 4,000 or 5,000, I see, to different public bodies, not a single public
9 body in each jurisdiction?

10 **MR SCHAEFER:** This is not an objection. We do positively say these may well be
11 relevant down the line.

12 **THE CHAIRMAN:** What are you proposing? That they get searched for relevance,
13 or?

14 **MR SCHAEFER:** We are proposing that they form part of the normal process, we will
15 put disclosure together.

16 **THE CHAIRMAN:** I am not talking about the timing.

17 **MR SCHAEFER:** Yes.

18 **THE CHAIRMAN:** Are you saying you will be disclosing all of these at a different date?
19 Are you saying you are going to screen them for relevance?

20 **MR SCHAEFER:** Sir, that is part of the disclosure report process. That would be
21 worked out. I can't tell you today exactly what the proposal would be for each of those.
22 That's a very reasonable line to go through, the disclosure report process.

23 **(Pause)**

24 **THE CHAIRMAN:** Right, you are not saying -- I appreciate this has come in relatively
25 late in the day, but there was an opportunity for you to put in evidence saying this is
26 a disproportionate exercise at this stage. You know, would take too many hours, it

1 | would be ridiculous, it would be very inconvenient, you have not put in any evidence
2 | of that.

3 | **MR SCHAEFER:** Sir, the submission is it may well be necessary to do this work, it
4 | will be duplicative to do large chunks of the disclosure process separately from and in
5 | advance of the disclosure report processes. You are looking at exactly the same -- for
6 | both purposes you are saying, who is holding documents? What are the relevant
7 | categories? What are the potential searches? Then it would be taking that entire
8 | exercise, and on Microsoft's approach doing a large subset of it in advance. My
9 | submission is one needs to have a reason why it is reasonably necessary and
10 | proportionate.

11 | **THE CHAIRMAN:** The reason is you are already deploying it, at least in
12 | correspondence.

13 | **MR SCHAEFER:** We have referred to it in correspondence, yes, it is not even referred
14 | to once in the pleadings.

15 | **THE CHAIRMAN:** Very well. Is there anything else you want to say on this class?

16 | **MR SCHAEFER:** On FOIA, sir, no I don't believe so.

17 | **THE CHAIRMAN:** Anything you want to add, Mr O'Donoghue on this?
18 |

19 | **Reply submissions by MR O'DONOGHUE**

20 | **MR O'DONOGHUE:** A couple of points if I may, sir.

21 | A timing point is raised. We first raised this on 8 February 2023, so they have
22 | had months to --

23 | **THE CHAIRMAN:** Show me that.

24 | **MR O'DONOGHUE:** Yes. It is 411, a letter of 8 February. It is in the G bundle.

25 | **THE CHAIRMAN:** Yes, I have 411.

26 | **MR O'DONOGHUE:** It is over the page, under section 2.

1 **THE CHAIRMAN:** "Freedom of information requests".

2 **MR O'DONOGHUE:** In 2.1 we refer back to the letter I showed you. We say:

3 "So that our clients can respond in a meaningful way, we require sight of the responses

4 ... You will be aware of the ICO guidance which confirms that disclosures under the

5 FOIA are to the world and are therefore within the public domain and are not

6 confidential.

7 "Please ... provide us with any responses received to the FOIA requests."

8 On 3 April we again wrote with our disclosure requests, which was --

9 **THE CHAIRMAN:** Sorry, 3 April, let me see that.

10 **MR O'DONOGHUE:** It is at 430, sir.

11 **THE CHAIRMAN:** Yes.

12 **MR O'DONOGHUE:** Under 6.

13 It is 437, sorry.

14 **THE CHAIRMAN:** Yes, I have it.

15 **MR O'DONOGHUE:** That is more than five weeks ago.

16 **THE CHAIRMAN:** Was there a response to that letter?

17 **MR O'DONOGHUE:** 447, sir, and 448.

18 **THE CHAIRMAN:** Sorry, whereabouts? Which paragraph am I meant to be looking

19 at?

20 **MR O'DONOGHUE:** It is really 7, 8 and 12. They make the point well, let's do EDQs,

21 and all of that will come later.

22 **THE CHAIRMAN:** Yes.

23 **MR O'DONOGHUE:** As you put to Mr Schaefer, sir, although formally the application

24 was issued on the 26th, that's almost two weeks ago today. And at no stage, including

25 the skeleton, have we had a hint of any specificity on proportionality or other reasons

26 for non-disclosure. For the first time on the hoof Mr Schaefer now says there are

1 a number of documents, and so on.

2 **THE CHAIRMAN:** Sorry, just remind me, where was the letter where the FoI was first
3 raised?

4 **MR O'DONOGHUE:** 8 February. It is G/48/411.

5 **THE CHAIRMAN:** G?

6 **MR O'DONOGHUE:** 48/411.

7 **THE CHAIRMAN:** No, sorry, the letter setting out that there had been freedom of
8 information requests.

9 **MR O'DONOGHUE:** Yes, sir, it was on --

10 **THE CHAIRMAN:** The first letter.

11 **MR O'DONOGHUE:** 407.

12 **THE CHAIRMAN:** 407, yes, I beg your pardon.

13 **MR O'DONOGHUE:** In January 2023.

14 **THE CHAIRMAN:** Sorry, I'm grateful.

15 **MR O'DONOGHUE:** They have had five months to make their response and for the
16 first time today we hear a rather half-baked proportionality objection articulated on the
17 hoof. That really is not satisfactory as a matter of fairness, but in any event it still
18 misses the point. All this material is the subject of specific requests, specific
19 responses. They are all sitting there in a repository. It is readily available material. It
20 requires no original or further work and processing. In the same way as the public
21 authorities who have made these responses handed them over, there can be no
22 objection whatsoever to those responses being handed over to the defendant in this
23 case. If they choose to deploy this material we are entitled to see the basket of the
24 cherries and not have the cherries picked in the way that has been done to date.
25 We say there is literally no good reason why this material should not be disclosed
26 today.

1 I do reiterate the point that it may well be very helpful on disclosure, because if we
2 apprehend that some public bodies are extremely interested in secondhand licences,
3 other public bodies are extremely uninterested, that may allow a much sharper focus
4 on the areas that matter. So there is a significant, we say, or potentially significant
5 case management benefit in this being handed over now as opposed to in some
6 months' time.

7 **MR SCHAEFER:** Sorry, if I may just correct one point.

8 **THE CHAIRMAN:** Of course, yes.

9 **MR SCHAEFER:** Mr O'Donoghue said the documents are sitting in a repository.
10 I don't know what that's based on but that is not the case. My understanding is that
11 they are in emails and would need to be searched for as such.

12 **THE CHAIRMAN:** Right. I understand.

13

14

Judgment

15 **THE CHAIRMAN:** There is an application by Microsoft for disclosure of specific
16 classes of documents. The first one that falls for consideration is certain freedom of
17 information, or documents provided pursuant to freedom of information requests which
18 have been made to various public authorities. Reference was first made to these
19 documents in a letter from the claimant's solicitors dated 24 February 2023, and
20 Microsoft have been seeking disclosure of those documents, in particular in a letter
21 dated 3 April 2023 Microsoft argue these documents are prima facie relevant in as
22 much as they have already been referred to and relied on in correspondence.

23 The defendants say that disclosure at this stage is premature. Disclosure should take
24 its ordinary course. They do not advance a positive case at the moment that these
25 documents are not relevant, and they have provided no evidence that the provisional
26 disclosure of these documents or early disclosure of these documents would be unduly

1 burdensome or disproportionate. It seems on its face these are relevant documents.
2 It is clear there should be relatively little difficulty in identifying them as they were
3 provided in response to specific requests from the claimants. In those circumstances
4 I think early disclosure is desirable, if for no other reason than to move these
5 proceedings along a little bit.

6 I will order disclosure. I am going to come back to dates, Mr Schaefer, if that's okay.

7 **MR O'DONOGHUE:** That is the first category.

8

9 **Application by MR O'DONOGHUE**

10 **MR O'DONOGHUE:** The second category, which I hope is equally short, is the
11 question of expunging. If we can go back to the draft order. It is F --

12 **THE CHAIRMAN:** Remind me of the tab again.

13 **MR O'DONOGHUE:** It is F/21/293.

14 **THE CHAIRMAN:** F, sorry?

15 **MR O'DONOGHUE:** It is part B.

16 **THE CHAIRMAN:** Right, yes, expunging. These are the documents referred to in
17 48.1.

18 **MR O'DONOGHUE:** Yes, if we quickly have a look at 48.1, just to anchor this in the
19 pleading. It is internal page 23, tab 2. A/2. They say:

20 "VL believes the campaign has also included where customers have agreed to
21 relinquish licences on their expiration Microsoft expunging all [I will ask you to
22 underling the word 'all'] references to such licences from Microsoft licensing
23 statements and from those customers ..."

24 If I can ask you, sir, to quickly read the rest of (1).

25 **(Pause)**

26 **THE CHAIRMAN:** Yes, okay.

1 **MR O'DONOGHUE:** Sir, on the face of it this is a very serious allegation.

2 **THE CHAIRMAN:** Yes.

3 **MR O'DONOGHUE:** It is a cover-up job.

4 **THE CHAIRMAN:** Yes.

5 **MR O'DONOGHUE:** For want of a better expression. You will see as pleaded no
6 specificity is given to that and these are allegations not to be bandied about lightly in
7 the absence of any basis for saying so.

8 Sir, if we turn quickly to our defence at A/3/57, please.

9 **THE CHAIRMAN:** Sorry, just say again.

10 **MR O'DONOGHUE:** Our defence, A/3/57.

11 **THE CHAIRMAN:** Yes.

12 **MR O'DONOGHUE:** Sir, it is (d), obviously we have looked at this for the purposes of
13 the pleading.

14 **THE CHAIRMAN:** You are not aware of any.

15 **MR O'DONOGHUE:** Yes. Not aware of any instances or references to licences being
16 expunged. So we have drawn a blank in terms of our requests.

17 As you picked up, sir, from the interchange with Mr Schaefer at the beginning of these
18 applications, they have now finally agreed to give -- let's look at what they say, it's at
19 G/88/509, please.

20 Sir, it is the paragraph that starts, "As already explained ..."

21 **THE CHAIRMAN:** Sorry, give me a second.

22 **MR O'DONOGHUE:** 509, sir, tab 88.

23 **THE CHAIRMAN:** Yes, sorry.

24 **MR O'DONOGHUE:** It is the second half. They say:
25 "Our client is prepared to give disclosure of those documents in its possession that it
26 is presently aware fall into the category sought in section 5. At the same time as it

1 responds to your clients' RFI ..."

2 So there was a belated concession.

3 **A couple of tabs on at 91.**

4 **THE CHAIRMAN:** These are the documents we are talking about, okay. 91, yes.

5 **MR O'DONOGHUE:** Yes. 1.3 and 1.4. They are effectively raising at this stage

6 a proportionality point. We can give you what's readily to hand, but nothing else. So

7 we, in my submission quite reasonably, went back at 1.3 on page 513:

8 "Please provide the following information so we can consider your request: nature and

9 volume of the materials in your client's possession that it is presently aware of:

10 "At 1.3.2 we sought further information on what they said would be the additional work

11 to obtain further material.

12 **THE CHAIRMAN:** Mm-hm.

13 **MR O'DONOGHUE:** Over the page, sir, 1.4, we say:

14 "Given the seriousness of these allegations we would expect your client to have

15 conducted adequate due diligence to identify evidence in advance of making these

16 allegations. As such, it is concerning that your client is unable to supply any relevant

17 materials until after the CMC and prefers not to conduct any searches beyond for

18 materials that it is 'presently aware'."

19 **THE CHAIRMAN:** Well, I mean it is not an inappropriate allegation if they are aware

20 of six examples.

21 **MR O'DONOGHUE:** Yes. We would at least like to see those.

22 **THE CHAIRMAN:** There is no dispute about that, is there?

23 **MR O'DONOGHUE:** There is no dispute about that.

24 **THE CHAIRMAN:** They will give you the ones of which they are aware.

25 **MR O'DONOGHUE:** Yes.

26 **THE CHAIRMAN:** I understand, and I will hear from Mr Schaefer, that they don't want

1 to go through a whole searching process for the ones which are currently not within
2 FOIA.

3 **MR O'DONOGHUE:** Yes. Sir, on that if I may?

4 **THE CHAIRMAN:** Yes.

5 **MR O'DONOGHUE:** Again there is a timing point. As early as 3 April and 431.

6 **THE CHAIRMAN:** 431?

7 **MR O'DONOGHUE:** Yes.

8 **THE CHAIRMAN:** Mm-hm.

9 **MR O'DONOGHUE:** It is 2.1. Key factual issues. The first one is the alleged
10 expungement of entries from Microsoft licensing statements. We pick up at 3 on the
11 expunging point. For the last five weeks they have been aware that a key issue in the
12 litigation is the expunging question. We have asked them well, when you say you can
13 give what's presently available, what is the amount of work that you say would need
14 to be done to give us the other material, and we have simply not had a response in
15 any shape or form.

16 We also note, sir, at 448, G/61, paragraph 12, they say:

17 "We intend to progress our client's disclosure report EDQ well in advance of the CMC
18 ..."

19 They say they have been working diligently on the EDQ and disclosure report in
20 advance of the CMC and yet notwithstanding the letter you saw requesting further
21 information we have had no indication from them whatsoever as to what can
22 reasonably be made available.

23 So the Tribunal is left in a very unsatisfactory position, in my submission, where
24 a proportionality concern is raised and despite having had weeks to do so the claimant
25 has put in no evidence whatsoever that would allow Microsoft or the Tribunal to
26 understand what exactly they have on hand, what they claim not to have to hand, and

1 the effort, if any, said to be involved in locating what is not to hand. We say simply as
2 a matter of evidence, if there is a proportionality objection it is completely and utterly
3 unevicenced in this case. They have had weeks to make that point good, and for
4 whatever reason they have chosen not to do so.

5 **THE CHAIRMAN:** Why do you need early disclosure of this?

6 **MR O'DONOGHUE:** Sir, for two reasons.

7 First of all, if there is no good basis for this allegation it may well be subject to strike
8 out.

9 **THE CHAIRMAN:** If the position is Mr Schaefer is unable to point to any documents
10 to support that paragraph, that would seem to put you in the driving seat.

11 **MR O'DONOGHUE:** Yes.

12 **THE CHAIRMAN:** So why do you need any searching?

13 **MR O'DONOGHUE:** Sir, the second reason, as you saw in our pleading, we have had
14 a look for materials on our side. We have found nothing. And if, through disclosure
15 at this stage, we can get a further indication as to where this material, if any, is indeed
16 located, that will greatly assist when it comes to disclosure as we move forward.

17 So given the impasse we have reached, any and all material that the claimants say
18 supports this allegation, this serious allegation, would be extremely helpful from our
19 perspective with a view to focusing our disclosure and either make it more effective or
20 perhaps reducing the burden. So it is a classic case management point that there is,
21 we say, material value in this material being disclosed at this stage.

22 Sir, that is all I wish to say on category 2.

23 **THE CHAIRMAN:** Mr Schaefer, as I understand you are prepared to give the
24 documents of which you are aware.

25 **MR SCHAEFER:** Yes, but --

26 **THE CHAIRMAN:** You say you shouldn't have to do an independent exercise in

1 searching.

2 **MR SCHAEFER:** It is a very broad category, documents that could or could not
3 support this allegation. It would require searches to be designed. Again, this is the
4 purpose of the disclosure report. As you say, if they want this for the purposes of
5 seeking to strike the paragraph out, surely it is enough for them to know what we
6 currently have that we are aware of.

7 **THE CHAIRMAN:** Yes.

8 **MR SCHAEFER:** I just want to draw your attention, while I am standing up, to footnote
9 7 of our skeleton on page 13. I say "our skeleton", my skeleton.

10 **THE CHAIRMAN:** 13?

11 **MR SCHAEFER:** Yes.

12 **THE CHAIRMAN:** Oh gosh, yes --

13 **MR SCHAEFER:** Microsoft makes quite a deal of the seriousness of this allegation,
14 and it obviously -- I am not shying away from this -- seems to feel strongly about it.
15 But given what is said I just wanted to make sure you understood the position on the
16 record. I am not asking you to make any finding of this, I just wanted you to be aware
17 of this in the context.

18 **THE CHAIRMAN:** Yes, I mean there may be all sorts of reasons for expunging apart
19 from some devious --

20 **MR SCHAEFER:** Yes.

21 **THE CHAIRMAN:** Yes, I understand that point.

22 Unless there was anything you wanted to add, Mr O'Donoghue, I am not minded to
23 order disclosure beyond those documents of which the claimants are currently aware.
24 Obviously there will be searching in due course and it is perfectly appropriate for you
25 to discuss with your learned friend whether there should be further searches in this
26 area, but there is no good reason to engage in a separate search exercise at this

1 stage. Is that sufficient? Right. Next.

2

3 **Application by MR O'DONOGHUE.**

4 **MR O'DONOGHUE:** Yes, so we go back to the draft order. This is part C. It is at
5 page 293.

6 **THE CHAIRMAN:** Mm-hm.

7 **MR O'DONOGHUE:** Sir, it really divides into two parts.

8 Points 1 to 5 are very, very specific requests, for example the business plan, the
9 financial targets, bank loans, things like that.

10 **THE CHAIRMAN:** Mm-hm.

11 **MR O'DONOGHUE:** Then 6 to 11 are, I accept, broader. So we can approach it on
12 that basis.

13 Bearing in mind what the Tribunal has indicated in relation to the second category, we
14 would be content in relation to 6 to 11 if they equally would provide whatever is readily
15 available. We are certainly not requiring them at this stage to undertake detailed
16 searches, in view of the Tribunal's ruling on the second category. So that may cut
17 through a lot of this.

18 Sir, on categories 1 to 5 -- again I can go through all of these individually and with a bit
19 of detail, but in my submission, certainly in qualitative terms, it is in the same category
20 as the FOIA stuff, in the sense that these are extremely specific requests, they ought
21 to be very readily available to hand. We can think of no good proportionality or other
22 reason why at this stage these extremely narrow requests should not be met.

23 That's how I propose to --

24 **THE CHAIRMAN:** I mean this case has been going for nearly two years. These are
25 categories which no doubt would be on your list when it comes to agreeing searches
26 with the claimants. Bearing in mind disclosure is around the corner, without prejudging

1 | dates, why do we need to embark on this now? What is your reason as to why this
2 | should be initial disclosure as opposed to disclosure?

3 | **MR O'DONOGHUE:** Yes.

4 | Sir, it is essentially the answer I gave to the other two categories, which is if we can
5 | understand based on readily available materials the more precise contours in relation
6 | to these key documents, it will allow a much more focused approach on disclosure
7 | and may therefore save potentially significant costs as we move forward. It is
8 | a classical case management question at this stage. If it is confined to either readily
9 | available materials or these extremely specific requests in categories 1 to 5, then the
10 | effort would be, in our submission, minimal and the gain potentially quite significant in
11 | terms of shaping future disclosure. That's the reason why we seek those at this stage.
12 | Sir, as I have said I can unpack a lot of this in more and lot more detail, but I am not
13 | certain the Tribunal would be greatly assisted by that.

14 | **THE CHAIRMAN:** I just wonder if we might momentarily park it and discuss the
15 | timetable for disclosure more generally.

16 | Shall we just give the transcript writers five minutes now?

17 | **MR O'DONOGHUE:** Could we make it ten minutes, because I will need to take
18 | instructions on, for example, the suggestion of an amendment which you have floated.
19 | My client is on the West Coast of America.

20 | **THE CHAIRMAN:** Floated on the?

21 | **MR O'DONOGHUE:** On amendments to the case on --

22 | **THE CHAIRMAN:** Oh, I was thinking of a statement of case, yes.

23 | **MR O'DONOGHUE:** On dominance and market definition.

24 | **THE CHAIRMAN:** Yes. 3 o'clock, is that?

25 | **MR O'DONOGHUE:** Yes.

26 | **(2.50 pm)**

1 **(A short break)**

2 **(3.02 pm)**

3 **THE CHAIRMAN:** Where have we reached?

4 **MR SCHAEFER:** I think, sir, you wanted to do directions to trial generally.

5 **THE CHAIRMAN:** Certainly disclosure directions to trial. Let's do directions to trial
6 generally, but start with disclosure.

7

8 **Discussion re directions to trial**

9 **MR SCHAEFER:** What I had done, and if I can hand it up, I am not sure if my learned
10 friends have this, is I have just sought to set out a table for your reference of the
11 proposals.

12 I am aware that these are not precise matches, because Microsoft's proposal was of
13 course to do a split trial.

14 **THE CHAIRMAN:** Sorry, what is this, the order?

15 **MR SCHAEFER:** I am sorry, the order I am providing because this is one of the orders
16 Microsoft had referred to as a basis for its timings proposals on disclosure, which is
17 not in the authorities bundle.

18 **THE CHAIRMAN:** Okay.

19 **MR SCHAEFER:** Just to preempt a couple of obvious criticisms, Microsoft had
20 referred to four cases in which --

21 **THE CHAIRMAN:** I am not really interested in what people have ordered in other
22 cases.

23 **MR SCHAEFER:** Then you can almost ignore the left-hand column and use the
24 right-hand column as a case management tool. All I am trying to show you there is
25 essentially how both parties get from where we are now to their eventual trial dates in
26 their proposals. You can see that on disclosure reports there is a bit of difference, it

1 is about five weeks, but by the time you get down it trial it is five and a half months.

2 **THE CHAIRMAN:** Let's start with disclosure reports.

3 Obviously it is advantageous to have relatively early exchange of disclosure reports,
4 because then there is a potential for sorting out any disputes this term as opposed to
5 having to go to the other side of the vacation. So your date is?

6 **MR SCHAEFER:** Disclosure reports, 23 June.

7 **THE CHAIRMAN:** 23 June. What's the difficulty with that? That is quite a way. This
8 is for just disclosure reports.

9 **MR O'DONOGHUE:** Yes.

10 **THE CHAIRMAN:** It is a piece of litigation that has been going on for two years. It is
11 not as if it has to start from scratch today.

12 **MR O'DONOGHUE:** Sir, the issue is this is not symmetric. One of the defendants is
13 a US corporation, the other's an Irish company, the other's a UK company. As
14 I submitted to you before the break, we will be looking at the entire EEA market, which
15 is a large number of countries and a number of other different entities. We now of
16 course have the issues of market definition and dominance, which will at least for EDQ
17 purposes and disclosure reports have to be thrashed out in considerable detail.

18 Certainly on my side of the court this is a very, very substantial undertaking indeed.
19 We are looking at literally dozens of jurisdictions, a large number of individuals. We
20 will need to build this from the bottom up.

21 **THE CHAIRMAN:** Why is it starting from scratch? You make it sound like it is starting
22 from scratch today.

23 **MR O'DONOGHUE:** It is not quite starting from scratch, but the heavy lifting -- if I can
24 call it that -- now begins in earnest.

25 **THE CHAIRMAN:** Right.

26 **MR O'DONOGHUE:** We will need to unpack, we will need to build this on a bottom-up

1 basis, bearing in mind the EEA markets, the different entities. In relation to the pleaded
2 case for example on these so-called customer anti-resale terms, can we just look at
3 the pleadings.

4 **THE CHAIRMAN:** Before we do that, is there any reason why it couldn't be done in
5 two tranches so that we have relatively early disclosure on questions of abuse, but
6 disclosure classes that are directed at dominance and quantum could take place later.
7 I am not talking about much later, I am talking -- so if one focused on the abuse, and
8 maybe this is a bad idea, but there seems no reason why -- at least subject to further
9 submissions -- disclosure reports and EDQs on abuse couldn't be ready by
10 23 June 2023. I don't understand.

11 **MR O'DONOGHUE:** Sir, we say of the two categories the abuse side of the equation
12 is actually if anything more problematic.

13 **THE CHAIRMAN:** Right, I see.

14 **MR O'DONOGHUE:** The customer anti-resale allegation in particular, let's quickly
15 look at it, sir, it is quite important.

16 **THE CHAIRMAN:** Yes, so we are looking at?

17 **MR O'DONOGHUE:** It is in the particulars of claim. It is at paragraph 47. Start at 46,
18 stage 1 of the campaign, the second sentence of 46:

19 "Microsoft offered such ... discounted subscription prices, but required them in
20 exchange to agree to terms expressly, and/or with the effect of, preventing or impeding
21 those customers from offering for sale the perpetual licences they would no longer
22 need as a result of the migration ..."

23 Then, 47:

24 "VL believes ... (1) terms under which the customer agreed to relinquish its perpetual
25 licences ... (2) terms preventing the customer from informing potential purchasers ..."

26 Then 48 is the expunging.

1 This isn't a criticism, but it is put in quite oblique terms and there is a suggestion that
2 various things in the context of negotiations were said to customers that had these
3 implied effects. And on our side that will require quite a detailed, or a deep dive in
4 terms of trying to interrogate in each of the local jurisdictions well, what exactly was
5 happening on the ground, who were the individuals involved and so on. And that is
6 a massive exercise.

7 In all of these cases it is said, and I have often said it myself, well, the defendant is
8 a large corporation. And that is true as far as it goes. But within large organisations
9 there may indeed be diseconomies of scale. Large organisations are complex, and
10 trying to herd all of these cats in terms of --

11 **THE CHAIRMAN:** Yes, but we are not herding the cats at this stage, we are just trying
12 to identify the cats.

13 **MR O'DONOGHUE:** Well, yes, but even that to understand -- of course the other thing
14 is the claim spans a number of years, and systems change and so on, and personnel
15 change. So on our side it is a complex and granular exercise on both the questions
16 of abuse and of course on dominance and market definition. The period, sir, that we
17 put forward wasn't a sort of opening gambit in the expectation we would end up with
18 something less, it was an absolutely fully formed consideration of the amount of work
19 we think will be involved to reconstitute the materials relevant to these allegations.

20 **THE CHAIRMAN:** Right.

21 **MR O'DONOGHUE:** This is of course a case, sir, unlike many others before this
22 Tribunal, where there is not a prior regulatory finding in relation to liability. To that
23 extent we certainly are starting from scratch and this will be a massive undertaking on
24 our side. So that is why we said, and with respect continue to say, that the end of July
25 for these two important documents is a realistic period.

26 **THE CHAIRMAN:** I have no evidence explaining why this can't be done in a further

1 six weeks from today. I mean the list of issues was sent to you a little while ago. The
2 pleadings were served many months ago. I don't understand why this is starting from
3 scratch, and if it is, and there is no explanation for why thought hasn't been applied to
4 this already.

5 Secondly, I have no evidence as to why it can't be done in six weeks. And six weeks
6 to identify a list of issues and an electronic disclosure questionnaire just seems ample
7 time, even starting from scratch. It may not be, but I don't have any evidence to
8 persuade me that it is not ample time.

9 **MR O'DONOGHUE:** We are not entirely starting from scratch, I accept that, but the
10 reason we put forward 31 July was that was our good faith attempt to reconcile the
11 obvious need for expedition versus a fair and orderly process on our side.

12 The claimant of course is a single entity that primarily is focused on the UK. It really
13 is apples and pears to say, "Well, they can do it, therefore so can we".

14 **THE CHAIRMAN:** I am not putting that point to you, I accept that things in large
15 companies can be very complicated, I accept that.

16 **MR O'DONOGHUE:** Sir, there is water under the bridge but this is the first CMC in
17 this case. There has been some veiled criticism in relation to delay. The simple fact
18 is we brought a strike out that was rejected at the time, not because it is a badly
19 founded in principle but because it is an issue for trial. Indeed, I note the CMA
20 proposes to intervene in relation to one of the key issues that forms the basis of the
21 strikeout. So we were perfectly entitled to bring that challenge, and we did.

22 There has not in fact been any delay. What happened was the transfer from the
23 Commercial Court to the Tribunal involves a degree of gearing up, and in fact the
24 claimants received the CMC date they requested. We have proposed a trial two years
25 from now, and given that today is the first CMC, in my respectful submission that is
26 a more than reasonable timeframe. This is a £269 million claim where there is no prior

1 regulatory finding covering the entire EEA plus the UK, and on our side it really is
2 an enormous undertaking to interrogate all of these systems, all of these people and
3 come up with a sensible set of proposals for the Tribunal and the claimant.

4 **THE CHAIRMAN:** Mr O'Donoghue, I am afraid I am not with you on this at the
5 moment. I am going to order 23 June. If, when further enquiry is made, it is not
6 practical, of course you can apply to have that date put back. But this Tribunal will
7 expect proper evidence and particularities and what has been done and what needs
8 to be done when considering whether to extend that time.

9 **MR O'DONOGHUE:** Sir, just to clarify, is that on the question of abuse?

10 **THE CHAIRMAN:** Well, you sort of declined my invitation. You said abuse was the
11 most complicated thing. If you would like to revisit that, I am quite happy to do so.

12 **MR O'DONOGHUE:** Sir, my point is we will be considering, obviously, the question
13 of amendment in the light of the Tribunal's comments on the split trial application. As
14 presently advised, as likely we will be making a series of amendments to market
15 definition and to dominance, and in relation to dominance on that hypothesis the
16 pleadings will not have closed for some period of time if those amendments are made.
17 We would suggest that if there is to be EDQs and DRs, in the first instance they should
18 focus on the question of abuse. I take what the Tribunal has in mind in relation to
19 timing.

20 On the question of dominance, where our case needs to be amplified, I accept that,
21 the idea of in parallel before those amendments have been made and pleaded back
22 to that we would have EDQs and DRs on those, in my respectful submission is
23 unrealistic.

24 **THE CHAIRMAN:** Mr Schaefer, subject to dates, would you see any advantage in as
25 much as getting an early date on abuse, relatively early date, as between the parties,
26 of 23 June and a later date for disclosure on the relevant market. Would that be

1 | disadvantageous? Would that lead to duplication? Is that potentially an attractive
2 | route?

3 | **MR SCHAEFER:** Sir, the proposal of an earlier date on the abuse issues is attractive,
4 | certainly.

5 | **THE CHAIRMAN:** Right.

6 | **MR SCHAEFER:** I can see Mr O'Donoghue's point that if they are going to plead
7 | a case on the other stuff that may push --

8 | **THE CHAIRMAN:** And quantum will fall into?

9 | **MR O'DONOGHUE:** That will be part of abuse.

10 | **MR SCHAEFER:** Abuse, yes.

11 | **THE CHAIRMAN:** Okay.

12 | Okay, we will come back to -- let's make that our working hypothesis for the moment.
13 | We would have exchange of disclosure reports and EDQs by 23 June on the issue of
14 | abuse and then there will need to be ... then will you have meetings before or after
15 | that to try and resolve any disputes between the parties as per the High Court?

16 | **MR O'DONOGHUE:** I think after, sir.

17 | **THE CHAIRMAN:** After. Then potentially any argument in July, is that subject to
18 | finding a date?

19 | **MR SCHAEFER:** Sir, yes. Our proposal was 21 July, which will give the parties four
20 | weeks between the disclosure reports and any need to resolve outstanding issues.

21 | **THE CHAIRMAN:** This is just disclosure on categories, yes.

22 | **MR SCHAEFER:** Sir, yes.

23 | **THE CHAIRMAN:** I mean there may be -- sorry, I am just going to look at my diary,
24 | there may be trying to find a date ...

25 | **MR O'DONOGHUE:** All we would say is if it is to be some date in July, which we say
26 | is problematic, the later the better. Again, there will be an asymmetric position in terms

1 of the amount to be interrogated and processed.

2 Experience also shows that the longer is left for the parties to try and iron out
3 differences the more tractable this may be for the Tribunal ultimately. But I appreciate,
4 sir, it may depend on your availability in the last ten days of July.

5 **MR SCHAEFER:** Sir, just to add to that, we proposed 21 July mainly in order to try to
6 get it into July. We are not wedded to that particular date. Obviously if one puts the
7 last day in July as the only possibility, that could cause issues, which is why we would
8 suggest a little bit earlier.

9 **THE CHAIRMAN:** I think we should timetable a meeting to discuss exchange of
10 disclosure reports and EDQs and that should take place promptly. Whether it is in
11 person, on the telephone or on Zoom doesn't matter. I think that should take place
12 within ten working days of the 23 June, whatever that is. Then application for
13 disclosure. So a disclosure CMC. There may be real difficulties in ...

14 **(Pause)**

15 Yes, I think I will have to, I mean there may be real problems in scheduling that in July
16 anyway. So maybe that has to go into September, more realistically. So in the light
17 of that --

18 **MR O'DONOGHUE:** Sir, we have no objection to September, if that helps.

19 **THE CHAIRMAN:** Why don't we give Mr O'Donoghue an extra week, because in the
20 end, Mr Schaefer, I don't think that's going to make any difference. Give him an extra
21 week until 30 June to produce the disclosure reports and EDQs. Then I think the
22 parties should ... I would still like to schedule an early meeting between the solicitors
23 to discuss and narrow the issues on disclosure. Then if we have the disclosure CMC
24 not before -- let's try and find a date in September, possibly the third week in
25 September, for the disclosure CMC.

26 **MR O'DONOGHUE:** Might I suggest, therefore, that the remaining directions also be

1 resolved at that CMC. The options would be we set this down for trial now --

2 **THE CHAIRMAN:** Yes.

3 **MR O'DONOGHUE:** -- and have the intermediate directions in September. Or we
4 deal with all of this in September in one go.

5 **THE CHAIRMAN:** When are you envisaging? You are suggesting providing
6 disclosure on 2 February 2024.

7 **MR O'DONOGHUE:** That might come forward a bit, depending on where we get to in
8 September. That's the date we have currently put forward.

9 **THE CHAIRMAN:** Mr Schaefer, what is your -- I mean if we fix a date, you might get
10 an earlier date if you hold on until September for trial. What's your position on this?

11 **MR SCHAEFER:** Sir --

12 **THE CHAIRMAN:** Disclosure is likely to be one of the key limiting factors as to how
13 quickly this trial can progress.

14 **MR SCHAEFER:** Sir, yes. I see that. Ultimately you won't be surprised to know that
15 ValueLicensing's concern is to get to trial.

16 **THE CHAIRMAN:** Of course.

17 **MR SCHAEFER:** One could see a value perhaps of you setting a date for that
18 purpose now and trying to work out how we get there later. But you may not feel in
19 a position to do that.

20 **THE CHAIRMAN:** I think that would be potentially difficult.

21 Do you mind -- I would just like to rise for five minutes and have a look at the court
22 diary, if that is acceptable.

23 **(3.23 pm)**

24 **(A short break)**

25 **(3.29 pm)**

26 **THE CHAIRMAN:** I think fixing it today is probably not going to be productive, so

1 I suggest we liaise in September.

2 That's the lay of the land on disclosure.

3 We still have your category, Mr O'Donoghue, which we parked.

4 **MR O'DONOGHUE:** Sir, I am content not to pursue that today.

5 **THE CHAIRMAN:** I am grateful.

6 **MR SCHAEFER:** Sir, I had, with apologies, one further point on the timing. I wasn't
7 sure whether you were intending today to deal with the date for the second round of
8 disclosure reports. The only concern being otherwise we may be fixing that date late
9 in September.

10 **THE CHAIRMAN:** Yes. Yes. We should.

11 **MR O'DONOGHUE:** Sir, might I suggest we will make what amendments we think
12 are appropriate within four weeks.

13 **THE CHAIRMAN:** I think it makes no difference. I hadn't necessarily intended the
14 defence be amended, a separate document, a separate statement of case would be
15 equally acceptable from the court's perspective.

16 **MR O'DONOGHUE:** Yes.

17 **THE CHAIRMAN:** Four weeks would seem good. Then so we would be looking at
18 disclosure lists and EDQs early in September.

19 **MR O'DONOGHUE:** Yes. Well, there may be questions whether Mr Schaefer,
20 whether the pleadings are a standalone document or part of the existing defence, as
21 to whether he pleads back to it. Normally he should, so we would suggest four weeks
22 and four weeks, come back in September for EDQ and DR and that.

23 **THE CHAIRMAN:** Yes, but I would like to resolve any disputes on the EDQs and the
24 disclosure lists at that hearing in September --

25 **MR O'DONOGHUE:** Yes.

26 **THE CHAIRMAN:** -- which is likely to be the second, possibly the third week

1 of September.

2 **MR O'DONOGHUE:** Yes. I hesitate to raise it, of course, but in view of your ruling on
3 split trial there is a possibility that that issue also needs to be discussed in September.

4 **THE CHAIRMAN:** Oh, to revisit the question of whether there is a --

5 **MR O'DONOGHUE:** Yes.

6 **THE CHAIRMAN:** I shouldn't have said that, should I? I am being flippant.

7 **MR O'DONOGHUE:** At that stage, of course, we will have had to put our cards on the
8 table.

9 **THE CHAIRMAN:** Even if it is revisited I anticipate it might be premature at that stage.

10 **MR O'DONOGHUE:** Even at that stage.

11 **THE CHAIRMAN:** Yes, but that is a matter for you.

12 **MR O'DONOGHUE:** The problem is once we cross the Rubicon in terms of starting
13 disclosure the savings go out of the window. So it is a chicken and egg issue.

14 **THE CHAIRMAN:** Yes, I wouldn't assume that even if it is split off it should be split
15 off before disclosure. I wouldn't make that assumption.

16 **MR O'DONOGHUE:** Yes, I am grateful.

17 **THE CHAIRMAN:** Anything else today?

18 **MR O'DONOGHUE:** Sir, we are content not to pursue the confidentiality ring today --

19 **THE CHAIRMAN:** Yes.

20 **MR O'DONOGHUE:** -- but that will need to be ironed out.

21 **THE CHAIRMAN:** Potentially -- well, subject to the scope of the disputes on
22 disclosure it is going to be at least day in September, isn't it?

23 **MR O'DONOGHUE:** I would say two out of prudence.

24 **THE CHAIRMAN:** Maybe we should fix for two at this stage.

25 **MR O'DONOGHUE:** Yes.

26 Sir, costs in the case?

1 **THE CHAIRMAN:** Costs in the case.

2 Thank you. I'm grateful.

3 **(3.33 pm)**

4 **(The hearing concluded)**

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